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REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR AND COMMON PLEAS COURTS.

CONSTITUTIONAL LAW—INJUNCTION—SCHOOLS.

[Summit Common Pleas, September 23, 1908.]

AKRON (BD. OF ED.) v. WILLIAM T. SAWYER.

1. STATUTE PRESCRIBING INSPECTION OF SCHOOLHOUSES AND ADEQUATE PROTECTION AGAINST DANGERS OF FIRE, HELD CONSTITUTIONAL.

Act of April 28, 1908 (99 O. L. 232), enlarging the powers of the chief inspector of workshops and factories to include inspection of schoolhouses, etc., as to fire protection; requiring inspection by district inspectors and reports thereof; giving notice to persons having charge thereof as to appliances, additions or alterations necessary to render premises safe and imposing on mayors the duty of prohibiting the use of such buildings for assemblage of people until plans are complied with, is not a taking of property without due process of law in violation of Sec. 1 of the fourteenth amendment to the United States constitution, but a requirement of lawful use thereof.

2. POLICE POWERS OF STATE AUTHORIZE CLOSING OF BUILDINGS FOR WANT OF ADEQUATE FIRE PROTECTION.

The state in the exercise of its police power may deprive the owner of the use of his property if the safety, health, peace, good order and morals of the community require it. Hence, act 99 O. L. 232, providing for the closing of schoolhouses and other public buildings pending the installation of fire protection directed by the chief inspector of workshops, etc., is within the police powers of the state.

3. FAILURE TO DESIGNATE DETAILS OF FIRE INSPECTION DOES NOT INVALIDATE ACT.

The function of determining the necessary appliances, alterations and precautions for safety of persons against the dangers of fires in public buildings and schoolhouses is properly delegated to inspectors as prescribed by act 99 O. L. 232; the fact that details of inspection are not designated therein but are left to be worked out by administrative officers does not invalidate the act.

4. BOARD CANNOT INTERPOSE ITS JUDGMENT AS TO PROPER FIRE PROTECTION FOR SCHOOLHOUSES.

A board of education, being a state agency cannot claim exemption, as might a private property owner, from the operation of act 99 O. L. 232, prescribing certain duties by another state agency, the chief inspector

Summit Common Pleas.

of workshops, etc., as to fire protection of schoolhouses as the orders of such inspector are the rules of the state, against which the board cannot interpose its judgment.

5. BOARD OF EDUCATION MAY ENJOIN ARBITRARY CLOSING OF SCHOOLS.

A board of education has capacity to bring suit to enjoin oppressive and arbitrary acts of a mayor in the closing of schools and depriving school children of the benefits thereof.

[Syllabus approved by the court.]

DEMURRER.

Grant, Sieber & Mather and E. F. Voris, for plaintiff.

N. M. Greenberger, city solicitor, J. Taylor, and O. E. Harrison, for defendant:

As to the constitutionality of the act. *State v. Holden*, 14 Utah 71 [46 Pac. Rep. 756; 37 L. R. A. 103]; *State v. Coal Co.* 36 W. Va. 802 [15 S. E. Rep. 1000; 17 L. R. A. 385]; *Munn v. People*, 94 U. S. 113 [24 L. Ed. 77]; *Union Pac. Ry. v. United States*, 99 U. S. 700 [25 L. Ed. 496]; *Cooley*, Const. Lim. 64; *Pattison v. Yuba Co.* 13 Cal. 175; *Leonard v. Wiseman*, 31 Md. 201; *Weller v. State*, 53 Ohio St. 77 [40 N. E. Rep. 1001]; *Champion v. Ames*, 188 U. S. 321 [23 Sup. Ct. Rep. 321; 47 L. Ed. 492].

Interference with police powers. *Davidson v. New Orleans*, 96 U. S. 97 [24 L. Ed. 616]; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Ferguson v. Selma*, 43 Ala. 398; *Montgomery v. Hutchinson*, 13 Ala. 573; *Rose v. King*, 49 Ohio St. 213 [30 N. E. Rep. 267; 15 L. R. A. 160].

Some leading cases on questions involved. *Cincinnati v. Steinkamp*, 54 Ohio St. 284 [40 N. E. Rep. 490]; *Lake Shore & M. S. Ry. v. Railway*, 30 Ohio St. 607; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; *Lake Shore & M. S. Ry. v. Sharpe*, 38 Ohio St. 150; *Powell v. Commonwealth*, 114 Pa. St. 265 [7 Atl. Rep. 913; 60 Am. St. Rep. 350]; *State v. Addington*, 77 Mo. 110; *State v. Gas L. & Coke Co.* 34 Ohio St. 572; *Budd v. New York*, 143 U. S. 517 [12 Sup. Ct. Rep. 468; 36 L. Ed. 253]; *Mugler v. Kansas*, 123 U. S. 623 [8 Sup. Ct. Rep. 273; 31 L. Ed. 205]; *New York & N. E. Ry. v. Bristol*, 151 U. S. 556 [14 Sup. Ct. Rep. 437; 38 L. Ed. 269]; 3 Tiedeman, State and Fed. Control of Persons and Prop., Art. 150; *Commonwealth v. Roberts*, 155 Mass. 281 [29 N. E. Rep. 522; 16 L. R. A. 400]; *People v. D'Oench*, 111 N. Y. 359 [18 N. E. Rep. 862]; *Wadleigh v. Gilman*, 12 Me. 403 [28 Am. Dec. 188]; *Welsh v. Hotchkiss*, 39 Conn. 140 [12 Am. Rep. 383]; *Vanderbilt v. Adams*, 7 Cow. 349; *Knoxville v. Bird*, 80 Tenn. (12 Lee) 121 [47 Am. Rep. 326]; *Fiske, Ex parte*, 72 Cal. 125 [13 Pac. Rep. 310]; *Brooklyn, In re*, 87 Hun 54 [33 N. Y. Supp. 869]; *Klinger v. Bickell*, 117 Pa. St. 326 [11 Atl. Rep. 555]; *King v. Davenport*, 98 Ill. 305 [38 Am. Rep. 89]; *Champaign Co. (Comrs.) v. Church*, 62 Ohio St. 318 [57 N. E.

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Rep. 50; 48 L. R. A. 738; 78 Am. St. Rep. 718]; *State v. Powell*, 58 Ohio St. 324 [50 N. E. Rep. 900; 41 L. R. A. 854]; *Palmer v. State*, 39 Ohio St. 236 [48 Am. Rep. 429]; *State v. Telephone Co.* 36 Ohio St. 296 [38 Am. Rep. 583]; *Roth v. State*, 51 Ohio St. 209 [37 N. E. Rep. 259; 46 Am. St. Rep. 566]; *Cincinnati Gas L. & C. Co. v. State*, 18 Ohio St. 237; *State v. Pipe Line Co.* 61 Ohio St. 520 [56 N. E. Rep. 464]; *Cin. H. & D. Ry. v. Sullivan*, 32 Ohio St. 152; *Davis v. State*, 19 Ohio St. 270; *Marmet v. State*, 45 Ohio St. 63 [12 N. E. Rep. 463]; *Walker v. Cincinnati*, 21 Ohio St. 14 [8 Am. Rep. 24]; *State v. Nelson*, 52 Ohio St. 88 [39 N. E. Rep. 22].

Can the board maintain this action. *Hopewell Tp. (Bd. of Ed.) v. Guy*, 64 Ohio St. 434 [60 N. E. Rep. 573]; *Buckingham v. Buckingham*, 36 Ohio St. 68; *Moody v. Arthur*, 16 Kans. 419; *Trustees v. Thoman*, 51 Ohio St. 285 [37 N. E. Rep. 523]; High, Injunctions Sec. 573; *Gallia Co. (Comrs.) v. Holcomb*, 7 Ohio (pt. 1) 232; *Putman v. Valentine*, 5 Ohio 187; *Cornell v. Guilford*, 1 Denio 510; *State v. Powers*, 38 Ohio St. 54; *Hamilton Co. (Comrs.) v. Mighels*, 7 Ohio St. 109; *Cin. W. & Z. Ry. v. Clinton Co. (Comrs.)* 1 Ohio St. 77; *Hunter v. Marion Co.* 10 Ohio St. 515; *Finch v. Board of Ed.* 30 Ohio St. 37; *State v. Davis*, 23 Ohio St. 434; *Neil v. Agricultural & Mech. College (Tr.)*, 31 Ohio St. 15; *State v. Covington*, 29 Ohio St. 102; *Cincinnati (Bd. of Ed.) v. Volk*, 72 Ohio St. 469 [74 N. E. Rep. 646]; *State v. Gardner*, 54 Ohio St. 24 [42 N. E. Rep. 999; 31 L. R. A. 660]; *Reeves v. Griffin*, 4 Dec. 461 (29 Bull. 281); *Thorpe v. Railway*, 27 Vt. 140 [62 Am. Dec. 625]; *Salem v. Railway*, 98 Mass. 431 [96 Am. Dec. 650]; *Train v. Boston Disinfecting Co.* 144 Mass. 523 [59 Am. Rep. 113]; *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53; *Treasurer v. Bank*, 47 Ohio St. 503 [25 N. E. Rep. 697; 10 L. R. A. 196]; *Cincinnati v. Bryson*, 15 Ohio 625 [45 Am. Dec. 593]; *Brown, In re*, 9 Dec. 810 (6 N. P. 178); *Squires v. Weiner*, 10 Circ. Dec. 293 (19 R. 736); *Stevens v. State*, 61 Ohio St. 597 [56 N. E. Rep. 478]; *Gibbons v. Institute*, 34 Ohio St. 289.

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The plaintiff alleges that it was notified by the inspector of work shops and factories to equip certain school buildings under its control "with divers fixtures, appliances and contrivances, called fire escapes and things appertaining thereto, ostensibly and pretendedly to promote the bodily safety and protection of the pupils to be attendant upon the said schools."

Thereupon the plaintiff "caused a due and adequate inspection of each and all of said buildings to be made both by its own members in person and by competent mechanics and architects, with sole and especial regard to making the said buildings" safe in all ways for the free exit of persons therein in case of fire.

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Plaintiff did not follow the directions of the inspector but made contracts for such fire escapes as it deemed necessary and alleges that, to this extent, it attempted to obey the orders of the inspector. As to the other buildings, plaintiff claims that the fire escapes with which they are already equipped are adequate for the safety of all persons who may be in any of said buildings in case of fire and for all the uses and purposes of the statute, and the expenditure of money required to further carry out and obey the order of the inspector "would be unnecessary and wholly wasted, without any compensating public advantage or benefit whatever."

The defendant pursuant to the statute threatened to prohibit the opening and occupancy of said school buildings until all of said fire escapes and fixtures as ordered by the inspector were provided.

This action was brought to enjoin the defendant from preventing the use of the schoolhouses in question. It is alleged that defendant at the instance of the chief inspector of workshops and factories has taken said action; that such inspector and defendant in that behalf are acting arbitrarily, oppressively and unlawfully; and that the statute under which they are assuming to act in so far as it purports to confer such arbitrary, oppressive or unconscionable powers or to authorize such useless expenditure of public money, is unconstitutional and void.

It is further urged that if the orders of the defendant are carried out it will deprive the children of the city of school privileges which will be a public calamity and be a punishment to them for something of which they are not at fault and will be a taking of property of the plaintiff and said city without due process of law and in violation of the constitution of the United States and its amendments.

The defendant demurs to the petition on the following grounds: First. That the court has no jurisdiction of the subject of this action; second, that plaintiff has no legal capacity to sue; third, that the petition does not state facts sufficient to constitute a cause of action.

The first two grounds of the demurrer will be passed upon in connection with the third ground.

The petition attacks the authority of the defendant on one point, that the act under which he acts is unconstitutional in that it provides for a taking of property without due process of law. This point was the one most carefully and persistently discussed by counsel and is of vital importance in this case.

Section 1 of the fourteenth amendment of the constitution of the United States provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

"Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state." *Walker v. Sauvinet*, 92 U. S. 90, 93 [23 L. Ed. 677].

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Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operations upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. *Dent v. West Virginia*, 129 U. S. 114 [9 Sup. Ct. Rep. 231; 32 L. Ed. 623].

Due process of law and the equal protection of the laws are secured "if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." *Duncan v. Missouri*, 152 U. S. 377 [14 Sup. Ct. Rep. 570; 38 L. Ed. 485]; *Leeper v. Texas*, 139 U. S. 462 [11 Sup. Ct. Rep. 577; 35 L. Ed. 225].

The fourteenth amendment of the constitution of the United States was not designed to interfere with the power of the state to exercise its police powers to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. *Barbier v. Connolly*, 113 U. S. 27 [5 Sup. Ct. Rep. 357; 28 L. Ed. 923]; *Mugler v. Kansas*, 123 U. S. 623 [8 Sup. Ct. Rep. 273; 31 L. Ed. 205]; *Kemmler, In re*, 136 U. S. 436 [10 Sup. Ct. Rep. 930; 34 L. Ed. 524].

"The state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele*, 152 U. S. 133, 136 [14 Sup. Ct. Rep. 499; 38 L. Ed. 385]; *Phillips v. State*, 77 Ohio St. 214, 217 [82 N. E. Rep. 1064].

It is a generally recognized proposition that the states possess certain powers never surrendered to the general government, and among these powers are the right to legislate for public health, public morals, public safety, for the general and common good and for the well-being, comfort and good order of the people. The power of the state may be exerted over these subjects without limit except as it is restrained by the constitution of the United States or its own constitutional restrictions. *Western Turf Assn. v. Greenberg*, 204 U. S. 359, 363 [27 Sup. Ct. Rep. 384; 51 L. Ed. 520]; *Hartford Fire Ins. Co. v. Railway*, 175 U. S. 91 [20 Sup. Ct. Rep. 33; 44 L. Ed. 84].

The act of April 28, 1908 (99 O. L. 232), entitled, "An act to enlarge the powers of the chief inspector of workshops and factories in the matter of public schools and other buildings, and to increase the number of district inspectors," is the one under which defendant was threatening to act.

This act provides, that the chief inspector of workshops and fac-

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tories shall cause the district inspector to inspect all schoolhouses and other buildings stated therein, used for the assemblage or betterment of people with special regard to the precautions taken for the prevention of fires, and the provision of fire escapes, exits, emergency exits, hallways, air space, and all other matters which relate to the health and safety of those occupying or assembling in such structures.

The district inspectors are required to file written reports of their inspection with the chief inspector and if such district inspector shall find that necessary precautions for the prevention of fire or other disaster have not been taken, nor means provided for the safe and speedy egress of the persons who might be assembled therein, said report shall specify such appliances, additions or alterations as are necessary to provide such precautions and protection.

It is then the duty of the chief inspector to notify the owner or person having control of such structure of the appliances, additions or alterations necessary to be added to or made to such structure.

The statute further provides:

"Upon receiving said notice it shall be the duty of the owner or person in control of such structure to comply with each and every detail embodied therein."

It is made the duty of the mayor, with the aid of the police, "to prohibit the use of said structure for the assemblage of people until" the recommendations of the report are complied with.

While the statute does not provide for any direct taking of the substance of the property nor a sequestration of the issues therefrom, nor a deprivation of the use thereof for the benefit of any particular person, it does provide that the owner or the one having control shall be prohibited from using it. This is for the benefit and safety of those whom business, duty, necessity or pleasure may cause to assemble at such places and for the general benefit, in that it tends to the peace of mind of the community by providing immunity from the horrors of accidents at such places.

This is not a taking of property nor depriving the owner of the lawful use of it, but simply requires him to use it in a lawful manner. *Cincinnati v. Steinkamp*, 54 Ohio St. 284, 289 [43 N. E. Rep. 490].

Is the necessity for immediate action such that the state may immediately close the structure until the measures of safety prescribed by its officers have been carried out? Has the state in the exercise of its police power, the right in this instance to deprive the owner of the use of his property until its orders are obeyed? Is the necessity such that the owner must suffer loss for the general good and peace of mind of society and the safety of the inmates of the buildings in question?

The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of

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the country essential to the safety, health, peace, good order and morals of the community.

There can be no serious contention over the right of the state to exert its police powers to prescribe rules for building, construction and equipment to insure the safety of the public and the occupants. The contention in this case is over the manner in which the state has attempted to exercise that power.

It has delegated to an officer, the inspector, the important function of determining whether the "Necessary precautions for the prevention of fire or other disaster" have been taken, and whether means have been provided for the safe and speedy egress of the persons who may be assembled therein and to specify what "appliances, additions or alterations are necessary to provide such precautions and protection."

The rights of the property owner cannot be subjected to the caprice nor the arbitrary decision of an official, nor can it be subjected to an unreasonable regulation, but the circumstances of each class or case must determine the reasonableness of the regulations prescribed.

In the matter of taxation and the making of assessments the owner must have notice and an opportunity to be heard. In *Londoner v. Denver*, 28 Sup. Ct. Rep. 708, decided by Supreme Court of the United States at October term, 1907, the authorities are cited.

The courts, however, have made a distinction between matters of taxation and the appropriation of property for public uses, and cases where the state exerts its police power. The delays incident to notice and hearing in taxation and appropriation cases work no hardship or danger to the public. The due process of law in executing the police power of the state is of necessity of a different kind. The exigences of many cases require immediate action. When the public health or safety is in peril, the process of action for relief must be swift. An impending disaster requires prompt administrative action. The public authorities may destroy buildings in the course of a conflagration, to arrest its further progress, destroy property to prevent spread of pestilence and act swiftly on many other occasions of public calamity. *Cooley*, Const. Lim. (7 ed.) 877.

So a particular use of property may be forbidden where by a change of circumstances or for any other good reason, without the fault of the owner, that which was once lawful, proper and unobjectionable has become a menace to the public health or safety. So may dangers and nuisances which have long been permitted, be abated when the public conscience of the state has aroused official action.

An act of this state which required owners of certain buildings upon notice from the inspector, to put up suitable fire escapes was held not to be a taking without due process of law in *Cincinnati v. Steinkamp*, *supra*.

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The law passed upon in that case was enacted February 28, 1888 (85 O. L. 34), and provided that the inspector should determine the location and numbers of the fire escapes and the material therefor and manner of construction.

The law, however, being of a general nature and not having uniform operation throughout the state was held unconstitutional on the ground that it violated Art. 2, Sec. 26 of the constitution of Ohio, but upon the question of due process of law the court held it would have been constitutional, and this even though the act had not provided for enforcing the orders of the inspector by a suit in equity. Reading from the dictum of Judge Spear in *Cincinnati v. Steinkamp*, *supra*, I quote from page 290:

"The enactment is but the exercise of the police power of the state, that power which is characterized by Mr. Justice Gray, in *Leisy v. Hardin*, 135 U. S. 127 [10 Sup. Ct. Rep. 681; 34 L. Ed. 128], as 'that inherent and necessary power, essential to the very existence of civil society, and the safeguard of the inhabitants of the state against disorder, disease, poverty and crime,' and necessarily extends 'to the protection, health, comfort and quiet of all persons and all property within the state.' It no more denies to the owner the use of his property than do those acts known as building laws, which forbid the erection of frame structures within prescribed limits, or define the thickness, and strength of walls, bearers, girders, etc., or direct the demolition of structures falling to decay, or otherwise endangering the lives of passersby, which acts so far as they are reasonable in their character, and adapted to accomplish the purpose for which they are designed, are uniformly held to be within the constitutional authority of the general assembly in its just exercise of the police power of the state."

From page 291: "Nor is the act open to the criticism that it violates that provision of section 1, of article 4 of the constitution of the United States, which declares * * * 'nor shall any state deprive any person of life, liberty, or property without due process of law,' for the settled doctrine is that this section does not abridge the exercise of the police power of the states, nor limit the subjects upon which they may legislate."

In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, *i. e.*, construction of a drainage system, it became necessary to change the location of the pipes of a gas company so as to accommodate them to the new public work and the cost was put on the gas company. Held not a taking of property and a proper exercise of police power. *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453 [25 Sup. Ct. Rep. 471; 49 L. Ed. 831].

Statutes requiring manufacturers and sellers of mixed paints to

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put label on same showing constituent ingredients and quantity of each, held not violation of the fourteenth amendment of the United States constitution. *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338.

A railroad is not deprived of property without due process of law by the recovery of penalties against it for violations of a valid state statute prohibiting the heating of passenger cars on other than mixed trains by stove or furnaces inside of, or suspended from, the cars, except for temporary use in case of accident or other emergency where the defendant was before the court.

Harlan, J: "One of the assignments of error questions the validity of the statute upon the ground that it deprives the plaintiff in error of its property without due process of law. As the action against the company was instituted and conducted to a conclusion under a valid statute, the defendant being before the court, there is no reason to hold that there was any want of the due process of law required by the fourteenth amendment." *New York, N. H. & H. Ry. v. State*, 165 U. S. 628 [17 Sup. Ct. Rep. 418; 41 L. Ed. 853].

It was held constitutional to compel a railroad company to light its tracks, in *Cincinnati, H. & D. Ry. v. Bowling Green*, 57 Ohio St. 336 [49 N. E. Rep. 121; 41 L. R. A. 422].

The owner of a building which he knowingly permits to be used for gaming purposes is not deprived of his property without due process of law by Sec. 4275 Rev. Stat. which authorizes an action to subject such building to the payment of a judgment obtained by an informer for the recovery of money lost there at play. *Marvin v. Trout*, 199 U. S. 212 [26 Sup. Ct. Rep. 31; 50 L. Ed. 157].

An act compelling person in possession of a race track to recognize tickets of admission and on failure to be liable to suit for damages and \$100 in addition to actual damages, held not taking of property without due process. *Western Turf Assn. v. Greenberg*, 204 U. S. 359 [27 Sup. Ct. Rep. 384; 51 L. Ed. 520].

The act of the general assembly of Ohio (90 O. L. 220; Lan. 5538; B. 3443-3) requiring street railway companies to provide screens for protection of motormen held proper exercise of police power and not a taking without due process. *State v. Nelson*, 52 Ohio St. 88 [39 N. E. Rep. 22; 26 L. R. A. 317].

The establishment of limits within the denser portions of cities and villages, within which buildings constructed of inflammable materials shall not be constructed, erected or repaired, may, in some instances be equivalent to a destruction of property, but regulations for this purpose have been sustained notwithstanding this result. Cooley, Const. Lim. (7 ed.) 878.

Prohibiting slaughterhouses in certain parts of city held reasonable. *Cronin v. People*, 82 N. Y. 318 [37 Am. Rep. 564]; *Metropolitan*

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Bd. of Health v. Heister, 37 N. Y. 661; *Milwaukee v. Gross*, 21. Wis. 241 [91 Am. Dec. 472].

Forbidding laundries except in brick or stone buildings upheld. *Yick Wo, In re*, 68 Cal. 294 [9 Pac. Rep. 139; 58 Am. Rep. 12]; *Yick Wo v. Hopkins*, 118 U. S. 356 [6 Sup. Ct. Rep. 1064; 30 L. Ed. 220].

It is unnecessary to cite the many cases where the exercise of the police power by the state has been upheld though it had provided no scheme for a hearing.

In the exercise of its right the state in many instances must vest authority in the authorities of some of the political subdivisions of the state, or in state officers, the power to make such necessary and reasonable regulations as are necessary to secure the health, safety and well-being of the community in respect to the matters legislated upon, and also in other instances to pass upon the things necessary to be done in order to carry out the provisions made in the state statutes.

There are some dangerous things to be regulated, concerning the treatment of which the legislature cannot anticipate. It can make general requirements but the details must be worked out by some administrative officer. See *Ozan Lumber Co. v. Bank*, 207 U. S. 251 and cases cited on page 253.

Take the matter of providing for the safety of persons who assemble in buildings, or of providing against dangers from fires or other calamity. If the state cares only to legislate as to height and declares that buildings shall be limited to a certain number of feet in height, as was the case in *Attorney General v. Williams*, 178 Mass. 330 [59 N. E. Rep. 812], the problem is simple.

But if the legislation is to provide for the entire safety of the occupants so far as practicable, it would be impracticable to frame legislation in detail to cover it. The exposure of the building to streets, alleys, squares, vacant lots, and other buildings, its height and other dimensions, openings, stairways, plans of hallways and rooms, height of ceilings and numerous other physical features of the structure must be taken into consideration as well as the arrangement of the contents of the building, the uses to which it is put, means of access from one part to the other and to adjoining premises, the age, condition, and character of the occupants, etc., etc. Where all these must be taken into consideration in determining what appliances are necessary to insure the safety of the occupants of the building, it is necessary for the legislature to delegate to some officer the function of making these determinations.

The act in question in this state has imposed upon the inspector the duty of making such determinations. Now, then, what view have the courts taken of this delegation of authority in the matter of police regulations, as bearing upon the question of whether the restrictions put

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upon property owners by that means are a taking of property without due process.

The Roberts law, (94 O. L. 33) providing for granting licenses to engineers if the examiner found the applicant trustworthy and competent, was held unconstitutional in *Harmon v. State*, 66 Ohio St. 249 [64 N. E. Rep. 117; 58 L. R. A. 618], because the act provided no standard as to qualification and no specifications as to wherein the applicant shall be trustworthy and competent, but all was left to the opinion, finding and caprice of the examiner. There being six examiners it would have meant a possible six separate standards. This was held to be a delegation of legislative power and in conflict with Art. 2, Sec. 1 of the constitution.

This law was re-enacted by act 95 O. L. 49 (Rev. Stat. 4364-89p; Lan. 7355 *et seq.*) providing for an examination in the construction and operation of steam boilers, steam engines and steam pumps, and also hydraulics, under rules made by the chief examiner which should be uniform throughout the state. This act was held constitutional in *Theobald v. State*, 30 O. C. C. 336.

Complaint was made in this case that no standard of qualifications existed. The court said:

"In the former act no subjects for examination were mentioned. Here the statute fixes just what subjects the applicant is to be examined in. How the legislature could have more definitely fixed what the examiners shall do is not easy to understand. If a percentage of answers had been fixed or a percentage of qualification had been fixed by the statute, it would still have been with the examiner to say what degree of qualification was indicated by any per cent of marking."

The court cites a similar delegation of authority in Sec. 559 Rev. Stat. governing examinations for admission to practice law; Secs. 4403, 4403c governing examinations of physicians; Sec. 4070 as to examination of teachers in the public schools; Sec. 4071a delegating to state commissioner of common schools authority over preparation of questions for examinations.

The federal government has authorized the postmaster-general to hold up mail matter of persons who in his judgment are conducting a fraudulent business and for other prohibited purposes. This was held a proper delegation of authority. *Public Clearing House v. Coyne*, 194 U. S. 497 [24 Sup. Ct. Rep. 789; 48 L. Ed. 1092].

Power delegated to secretary of war to determine when a bridge is an unreasonable obstruction to navigation and to require such changes as the government engineer may prescribe, was not unconstitutionally delegated. *Union Bridge Co. v. United States*, 204 U. S. 359, 364 [27 Sup. Ct. Rep. 367; 51 L. Ed. 523].

Under a statute authorizing a municipal corporation, when the

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council shall deem it necessary, to require railroad company to light its railway, a village in Ohio passed an ordinance requiring a portion of a railway track to be lighted with electricity in a certain manner. Held a proper exercise of power in *Cincinnati, H. & D. Ry. v. Bowling Green*, 57 Ohio St. 336 [49 N. E. Rep. 121; 41 L. R. A. 422].

An ordinance of San Francisco put into the board of police commissioners power to grant liquor licenses and provided that they should grant it if the applicant got the written recommendation of twelve citizens owning real estate in the block or square where the business of liquor selling was to be carried on. It was held that the refusal to grant license was no violation of the federal constitution. *Crowley v. Christensen*, 137 U. S. 86 [11 Sup. Ct. Rep. 13; 34 L. Ed. 620].

A statute of Illinois confided to state mine inspectors discretion to determine the number of times each mine should be inspected, and to regulate the charges therefor, which must be paid by the mine owner. This act was held not repugnant to the fourteenth amendment nor arbitrary or unreasonable. *Consolidated Coal Co. of St. L. v. Illinois*, 185 U. S. 203 [22 Sup. Ct. Rep. 616; 46 L. Ed. 872].

In *Cincinnati v. Steinkamp*, *supra*, the delegation of a discretion to the inspector to determine the location and number of the fire escapes on a building and the material out of which to be built and the manner of construction including size, shape, plan, strength, etc., etc., was not held objectionable.

Inspectors have been clothed with discretionary powers in the following instances and the acts upheld by the courts: Cows infected with tuberculosis destroyed without compensation, *Houston v. State*, 98 Wis. 481 [74 N. W. Rep. 111; 42 L. R. A. 39]; peach trees affected with "yellows" destroyed, *State v. Main*, 69 Conn. 123 [37 Atl. Rep. 80; 36 L. R. A. 623; 61 Am. St. Rep. 30]; milk of a quality below a prescribed standard destroyed, *Deems v. Baltimore*, 80 Md. 164 [30 Atl. Rep. 648; 26 L. R. A. 541; 45 Am. St. Rep. 339]; health officer may kill diseased animal, *Newark & S. O. H. C. Ry. v. Hunt*, 50 N. J. L. 308 [12 Atl. 697]; to destroy nets used in violation of fishing laws, *Bittenhaus v. Johnston*, 92 Wis. 588 [66 N. W. Rep. 805; 32 L. R. A. 380].

Other mining cases providing for ventilation and the erection of structures to facilitate escape of miners in case of accident are:

Chicago, W. & V. Coal Co. v. People, 181 Ill. 270 [54 N. E. Rep. 961; 48 L. R. A. 554]; *Consolidated Coal Co. v. People*, 186 Ill. 134 [57 N. E. Rep. 880; 56 L. R. A. 266].

An ordinance giving the mayor power to determine whether a person applying for a license to sell cigarettes has good character and reputation and is a suitable person to be instructed with their sale, but requiring him to grant a license to every person fulfilling these conditions, does not vest in him any arbitrary power to grant or refuse a

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license, in violation of the provisions of the fourteenth amendment of the United States Const., either in regard to the clause requiring due process of law, or in that requiring equal protection of the laws.

Regulations respecting the pursuit of a lawful trade or business, being an exercise of the police power, are within the authority of the state, and form no subject for the federal interference unless they are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law. *Gundling v. Chicago*, 177 U. S. 183 [20 Sup. Ct. Rep. 633; 44 L. Ed. 725].

The determination of whether necessary precautions for the prevention of fire or other disaster have been taken, or means provided for the safe and speedy egress of the persons who might be assembled in a building, must, as heretofore pointed out, necessarily, be confided to some officer.

The legislature could not anticipate the necessities of each case and must confide it to some official. As was said by Judge Spear in *Rose v. King*, 49 Ohio St. 213, 222 [30 N. E. Rep. 267; 15 L. R. A. 160], "What would be proper and 'convenient' would have to be determined by the circumstances of each case." This, also, was a fire escape case arising out of Sec. 2573 Rev. Stat.

If the case in hand involved a private property owner and the current authority on the subject of the exercise of the police power of the state were consulted, and followed, the court would be constrained to hold the act of April 28, 1908 (99 O. L. 232), constitutional, but the plaintiff in this case is a public body, an agency of the state, which complains of the requirements made of it by another agency of the state and it is not in a position as against the state to urge those considerations which might exempt a private property owner from the operation of the statute. The statute might be unconstitutional as to a private owner and not as to the board of education.

Article 1, Sec. 7 of the constitution of the state provides that "It shall be the duty of the general assembly to pass suitable laws * * * to encourage schools and the means of instruction."

Article 6, Sec. 2 of the constitution provides: "The general assembly shall make such provisions, by taxation, or otherwise, as * * * will secure a thorough and efficient system of common schools throughout the state."

In obedience to these mandates of the constitution, in 1853, the general assembly passed an act "To provide for the reorganization, supervision and maintenance of common schools" (51 O. L. 429). See Sec. 3885 Rev. Stat. *et seq.*, for statutes providing for a continuation and extension of that policy of the state. This system created by this act

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was the outgrowth of, and superseded, the system inaugurated under the Akron school law.

The common schools of the state are the fruit of the constitution, making a general educational system. *Finch v. Toledo (Bd. of Ed.)* 30 Ohio St. 37 [27 Am. Rep. 414]; *Diehm v. Cincinnati*, 25 Ohio St. 305.

The boards of education of the state hold the property intrusted to their custody only as a public agency of the state. *Attorney-General v. Lowrey*, 199 U. S. 233, 239 [26 Sup. Ct. Rep. 27; 50 L. Ed. 167].

The school districts are organized as mere agencies of the state in maintaining its public schools. *State v. Powers*, 38 Ohio St. 54, 61.

The board is simply the custodian of what the legislature sees fit to intrust to it and is bound to use what is thus intrusted to it in the manner directed by the legislature and not otherwise, and to deliver it up when directed. It holds property, but only for carrying out the policy of the state. It constitutes an agency by which the state carries out its policy and purposes in educating the youth of the state.

The board of education is only a quasi-corporation, *Finch v. Toledo (Bd. of Ed.)*, *supra*; *State v. Powers*, *supra*; *Hunter v. Mercer Co. (Comrs.)* 10 Ohio St. 515; *State v. Cincinnati*, 20 Ohio St. 18, 37, an organization subject to the control of the legislature. It constitutes the instrument by which the legislature administers the department of the civil administration of the state which relates to education and the schools.

Any regulations the state may prescribe for the government of the schools, the care of the school property or the means of protecting the inmates of the schools must be obeyed. If it delegates to the inspector of work shops and factories the duty of prescribing ways and means tending to insure safety for the inmates of the schools or other public institutions, the orders of these inspectors become rules of conduct for the boards having charge of such institutions.

The boards cannot interpose their judgments in the premises against that of the officers designated and appointed by the state for that special purpose.

If the unconstitutional provisions of an act are so interwoven with the other provisions of the act as to be inseparable, the whole act would be unconstitutional. *Harmon v. State*, 66 Ohio St. 249, 252 [64 N. E. Rep. 117; 58 L. R. A. 618], but otherwise a part of an act may be constitutional and the balance unconstitutional. *Pump v. Lucas Co. (Comrs.)* 69 Ohio St. 448 [69 N. E. Rep. 666].

In construing statutes the rule is to enforce them so far as they are constitutionally made, rejecting only those provisions which show an excess of authority by the enacting power. *Cincinnati v. Bryson*, 15 Ohio 625 [45 Am. Dec. 593].

Where part of an act is separable from the remainder. its consti-

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tutionality will save it from the constitutional infirmities of the remainder; *Gibbons v. Catholic Institute*, 34 Ohio St. 289; *Treasurer v. Bank*, 47 Ohio St. 503 [25 N. E. Rep. 697; 10 L. R. A. 196].

A part of a section may be constitutional and another not. Sections are artificial divisions of a law. The substance and the parties and subjects respectively affected are to be considered, *Stevens v. State*, 61 Ohio St. 597 [56 N. E. Rep. 478].

Where a literal reading of an act would make it unconstitutional, but if read and interpreted in the light of the extent of the authority which the legislature had, it would be constitutional, it was held that it should be regarded as constitutional. *Coburn v. San Mateo Co.* 75 Fed. Rep. 520, 526.

The rejection of some of the provisions of a statute for unconstitutionality will not vary the sense or meaning of its remaining provisions which are to be construed as well in the light of those rejected as of those which remain. *State v. Dombaugh*, 20 Ohio St. 167, 174.

A part of a statute may be unconstitutional and the remainder valid; whether or not the infirmity that avoids a part affects the entire act, depends upon the connection and dependence on each other of its various provisions. *Little Miami Ry. v. Greene Co. (Comrs.)* 31 Ohio St. 338, 444.

When the unconstitutional part is stricken out, if that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. *Cooley, Const. Lim.* (7 ed.) 247.

If the act in question be construed as to its constitutionality only as it affects schoolhouses used in the public school system of the state and in the custody and control of the boards of education created by the state and the asylums and other buildings in the custody and under the control of state institutions and state agencies, these are entirely separable from the other buildings mentioned and the statute may be considered as constitutional so far as it affects these objects, though it may be otherwise in so far as it affects buildings owned and controlled, and in the custody of private persons. *Black, Interp. of Laws, and cases cited*, pp. 96-98.

In view of that criterion of interpretation that the court must presume the constitutionality of the act, the court finds that as to the plaintiff in this suit, the act in controversy is constitutional. *Black, Interp. of Laws* 93. *Cooley, Const. Lim.* 252 *et seq.*

If the constitutionality of the act under which the defendant has presumed to act in this case, were all that was to be considered, the demurrer should be sustained, but the petition charges that the defendant and the inspector of workshops and factories under whose orders

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the defendant has acted and threatens to act, have acted arbitrarily and oppressively.

Without regard to the question of the constitutionality of the act under which the mayor is acting, if his acts are oppressive and arbitrary, or the exactions of the officer under whose orders he is acting pursuant to the statute are unreasonable, arbitrary and oppressive, a court of equity would have jurisdiction to restrain the execution of the requirements of the inspector and the execution by the mayor of the requirements of the inspector. *Chase v. Middleton*, 123 Mich. 647 [82 N. W. Rep. 612].

It is the duty of the court under the circumstances and under the allegations of the petition, in the interests of justice and the public welfare, to inquire into the charge that these officials are acting arbitrarily and oppressively, and determine whether the plaintiff for that reason is entitled to the relief demanded. The courts have ever interposed to protect the citizen from the unnecessary, unreasonable, arbitrary, oppressive and unjust exactions of public officials.

Even in carrying out the police power of the state such acts of officials would constitute a want of due process of law. The general power of the legislature to determine what is necessary for the public interests and the right of its officers to execute its commands are limited only by the rights of public and private parties to have an inquiry as to the reasonableness and fairness of the exactions and whether the same are under and within the limits of the constitution. *Phillips v. State*, 77 Ohio St. 214, 217 [82 N. E. Rep. 1064].

If by any unreasonable, arbitrary and oppressive act the defendant threatens to close up any of the schools and deprive the school children of the benefits thereof and to that extent impede the state in carrying out its policy of instruction, the board of education is the only body or person, logically, upon whom would devolve the duty of protecting the public interest in that behalf.

The plaintiff, therefore, having capacity to sue and the court having jurisdiction, and the plaintiff having complained in its petition that the acts of the defendant are unreasonable, arbitrary and oppressive, and it being entitled to have a judicial inquiry into this matter and the petition for that reason containing facts sufficient to constitute a cause of action, the demurrer of the defendant to the petition is overruled.

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INSURANCE—RECEIVERS.

[Superior Court of Cincinnati, Special Term, April, 1908.]

WALTER L. BENSON ET AL. V. COLUMBIA LIFE INS. CO. ET AL.

1. STATUTORY REMEDY TO WIND UP UNSOUND INSURANCE COMPANIES IS EXCLUSIVE.

The cardinal object of Secs. 274, 275, 276 Rev. Stat., prescribing proceedings against unsound insurance companies by the commissioner of insurance is the protection of the public. They furnish the particular legal remedy to be pursued, and confer no authority justifying usurpation of this power by shareholders, policy holders and creditors, nor warrant a court of equity upon their application to wind up the affairs of an insurance company.

2. PAST IRREGULARITIES AND MERE DELINQUENCIES OF OFFICERS NOT GROUND FOR RECEIVERSHIP.

Mere delinquencies and irregularities of a life insurance company and its officers wholly past, of which there is no immediate or apparent indication of repetition in the future, will be deemed closed transactions and consequently afford no ground for appointment of a receiver.

3. MISMANAGEMENT OF CORPORATE AFFAIRS REGULATABLE BY SHAREHOLDERS WITHOUT COURT INTERVENTION.

Mismanagement or irregularities of corporate affairs, unaccompanied by fraud, not involving acts of moral turpitude, looting, abandonment, or attempts to carry out illegal purposes or unlawful business, should be regulated by shareholders and not by intervention of a court of equity through a receivership.

4. EQUITIES OF CASE FOR APPOINTMENT OF RECEIVERSHIP OF INSURANCE COMPANY.

Where the appointment of a receivership for a young life insurance company, passing through the usual slow growth of such institutions and experiencing the heavy expense of procuring new business, would render all outstanding insurance valueless, the costs of administration by strangers would deplete its remaining assets, spelling ruin and enforcing a winding up of its affairs, a court of equity before granting the order should consider all the equities of the case as well as the mere technical legal rights of those seeking the order.

5. RECEIVERSHIP DENIED IN ACTION FOR WINDING UP AFFAIRS OF INSURANCE CORPORATION.

A receivership will not be appointed to wind up the affairs of an insurance company where it appears that ultimate relief can be afforded by law.

6. DISCRETION TO ACCEPT INSURANCE ABOVE AGE LIMIT IN RATE BOOK.

Accepting insurance above the age limit in the book of rates at recognized standard rates is within the discretion of the board of directors of a life insurance company.

[Syllabus approved by the court.]

W. E. Taylor, Cogan & Williams, Kinkead, Rogers & Ellis and W. H. Parkinson, for plaintiffs.

P. M. Pogue, C. B. Matthews, T. B. Paxton, Sr., for defendants.

HOFFHEIMER, J.

This matter came on to be heard on the motion of plaintiffs for the appointment of a receiver. The petition is voluminous, and the charges

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that are made the basis of this action cover some twenty pages of type-written matter. Plaintiffs represent some thirty shares, as against seventeen hundred shares of stock, and they likewise hold \$27,500 worth of life insurance as against some \$1,600,000 now outstanding. Plaintiffs claim they sue on behalf of themselves and all other stockholders, policy holders and creditors, although it is not evident to the court that any stockholder, policy holder or creditor other than these plaintiffs evince any sympathy with the claim of plaintiffs, or join in this request for a receiver.

The directors and executive officers of this company who stand charged with mismanagement and fraud (constructive at least), are on the whole men of probity and excellent business reputation. Almost all of them, on being apprised of the charges here made, promptly and vigorously protested against the appointment of a receiver, and they assert that a receivership would not redound to the best interests of the shareholders and policy holders.

The plaintiffs themselves did not appear at any time during the extended hearing of this motion, save by counsel, and the principal actor on behalf of plaintiffs, the court could not help but observe, was Mr. Moore, one of the company's general agents and partner of Mr. Carl Hansen, who has instituted suit at Chicago to rescind a contract of purchase of this company's stock (a deal involving \$160,000) and whose interests it will thus be observed are not inconsiderable.

The testimony shows that Mr. Moore was equally involved in the \$2,000 transaction with Sumner Cross—a transaction now complained of by plaintiffs, facts which although they ought not to prejudice any rights of these plaintiffs, nevertheless should be borne in mind in considering the entire case and this application for receivership.

The testimony also shows that Mr. Moore has been a constant fault finder (see testimony of James Albert Green, director), not, however, with the conduct or acts of the board or executive officers but with the president, Felix G. Cross (see particularly his letter to C. B. Matthews, January, 1908), and his one endeavor has been, for reasons entirely disassociated with the charges here made, to have said Cross removed from the presidency of this company.

The Columbia Life Insurance Company is a young company and is passing through, what seems from the evidence to be, the common experience of all new life insurance companies. It appears that life insurance companies are of slow growth; that the expense of procuring new business is heavy; and that the expense of securing new business for this company does not exceed the expense of securing new business in all ordinary life insurance companies. While it appears that the expense of securing new business has increased for the fraction of the

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year up to this hearing, the \$5,000 death loss referred to in Hyde's letter to Matthews, April 9, 1908, would seem to have been taken into consideration in figuring the increase, and affords explanation thereof.

The business of the company, however, while not as satisfactory as might be desired, as was substantially testified to by Director Green, has never had a year wherein it has not made some forward stride with reference at least to procuring new business, as the following table shows. Insurance in force at the end of the year: 1904, \$2,661,405; 1905, \$2,922,026; 1906, \$3,527,309; 1907, \$4,607,276. If any percentage of this is reinsurance the testimony of the actuary that reinsurance under mutual arrangement is valuable is not overcome.

True the company does not appear to have made any net earnings up to date, but it ought not to be overlooked that the insurance that has been obtained by the expenditure of the company's money is a very valuable asset in the ordinary sense of the term at least, and this is worth, according to the evidence, \$35 or \$40 a thousand. This item, then, should certainly be remembered in considering the practical solvency of the company, and when considering the rights and interests of all the policy holders and shareholders.

I have adverted at the outset to these matters generally, because in considering the technical legal rights of plaintiffs it is proper that the court have in mind also the rights of all interested in this property. Nothing is better settled than that courts of equity act with great reluctance and caution in the matter of appointing receivers. In *Baker v. Fraternal Mystic Circle*, 1 Dec. 579 (32 Bull. 84), it was said:

"In the whole armory of equity jurisprudence, one of the most formidable weapons is a receivership. When there is a contest, a very strong case, a case which, upon the facts, stands out in persuasive clearness, must be proved, before this weapon will be drawn."

And the greatest circumspection is to be employed in the exercise of the discretion, and this is not to be influenced by the technical legal rights of the parties but by the equities of the entire case.

Aside from the technical legal rights of plaintiff can there be any doubt as to what a receivership would mean in this case to all the others interested?

The appointment of a receiver would render all the outstanding insurance valueless (plaintiffs' admission by brief). This insurance is worth, as stated (and this is uncontradicted), \$30 to \$40 a thousand—an ordinary asset of \$160,000 to \$170,000.

If it be true, as plaintiffs claim, that the witness who gave this testimony is not expert, it is just as true that the court, in the absence of testimony to offset that claim, would be less warranted in substituting any opinion of its own. A receivership, then, would not only mean a

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loss to the stockholders of this valuable asset, but the property would be taken out of the hands of its statutory officers, designated by the vast majority of the stockholders, and the *corpus* would be placed in the hands of strangers to administer, thus saddling the remaining assets with the usual heavy expense incident to that mode of administration. *Havemeyer v. Superior Court*, 84 Cal. 327, 369 [24 Pac. Rep. 121; 10 L. R. A. 627; 18 Am. St. Rep. 192]; *Robison v. Railway*, 7 Dec. 312 (5 N. P. 293).

It would spell the immediate ruin, collapse and the enforced winding up of this corporation. Indeed counsel for plaintiffs so understand it, and with characteristic frankness assert (I do not undertake to quote *in totidem verbis*), "That this company is dead; that it is better for this court to wind up the corporation than to permit the recreant board to do so, or to permit the insurance commissioner to do so, as they may and must, if the relief here asked shall be denied."

But, if the winding up of this company is the ultimate relief sought, and it appears that such relief can be afforded at law, then there is no room for the special remedy of receivership. Alderson, *Receivers* Sec. 7, pp. 10, 11; High, *Receivers* Sec. 301, p. 261.

Bearing in mind, then, that the appointment of a receiver would signify the immediate collapse of this enterprise, which if left alone "would be an ornament to the city" (James Albert Green, director), and would be for the best interests of the stockholders and policy holders (protest of nineteen directors), what grounds are urged for the application of this harsh remedy?

It would be impossible save in a somewhat general way to discuss all the complaints set out in the petition. Some of them, namely, misrepresentation and the charge as to rebating or the making of secret profits in contracts of printing and supplies, are utterly unsupported by evidence. The charge that F. G. Cross profited by deals in stock is not proven. A number of charges cover things done in the past. If there were delinquencies in those particulars, they are closed transactions. Many things complained of are freely admitted to have been done, and there is express avowal that there will be no repetition of these matters in the future. Nor does the evidence warrant the court in believing that there is any immediate or apparent danger that this word will not be kept, or that similar delinquencies will occur or threaten to occur. Judge White speaking for the court in *Cincinnati, S. & C. Ry. v. Sloan*, 31 Ohio St. 1, 7, said:

"A provisional receivership is, in effect, an injunction, and something more stringent still. It is to be granted with great caution, and only in case of pressing apparent necessity." Citing *Edwards, Receivers* 13.

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And in 5 Pomeroy, Eq. Jurisp. Sec. 64, it is said:

"Past and remote dangers are not sufficient to invoke the power of appointment. And past transactions are not sufficient to warrant the practical winding up of a corporation. See, also, 5 Pomeroy, Eq. Jurisp. 214, Sec. 121 and note 271.

And in *North Fairmount Bldg. & Sav. Co. v. Rehn*, 8 Dec. 594, 606 (6 N. P. 185), Judge Rufus B. Smith of this court said:

"It seems to us quite clear that these acts would not justify throwing the association into the hands of a receiver or even of issuing an injunction against the directors.

"First—Because the acts, even if illegal, as to which we express no opinion, were done in good faith and were free from all taint of moral turpitude.

"Second—Because they have been abandoned and there is no intention or threat that they will be repeated."

The discounting of agents' notes, taken for advances in several instances, and turning the proceeds into the coffers of the company, are past transactions and nothing similar is threatened. It may be noted, also, they involve no liability on the part of the company.

If Sumner Cross realized profit from buying or selling of small blocks of stock, it will be noted that he was not a member of the board or executive committee. While the court, however, is not to be understood as approving those transactions, nevertheless they are past and nothing similar seems to threaten.

The McLain, Lee, Bradford Shinkle small stock transactions were isolated transactions, occurred in the past, and in all of this I see no ground for a receiver.

Some commissions were paid Sumner Cross on insurance. In obtaining this insurance he seems to have been aided by his father, the president of this company. All of this, however, seems to have been done prior to February or March, 1907. The evidence shows that prior to those dates Sumner Cross was employed at a very small salary. The agreement called for half his time, and, under a fair construction of the contract, he could write insurance and earn commissions when not otherwise at work for the company. After the date mentioned, however, he was given an increased salary and he was to earn no commissions. The evidence fails to show that he received commissions on new business from March, 1907, down to the time of this hearing. Those transactions, in any event, are past, and even if they involved any wrong, it will be observed that this very board, now complained of, voluntarily put a stop to such transactions.

It is true the "book of rates" fixed by the president established no rate beyond the age of sixty years. Nevertheless, when the company was

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organized Dr. Cross, desiring to be of the first to have a policy in this company, "called the attention of the committee or board to the age" (testimony of Dr. Cross) and by and with the full consent of the executive officers he was authorized to take out a policy, although he had reached the age of sixty-one.

But the rate at which he took the policy was according to recognized standard rates, and I see no reason why the board of directors, in whom is vested the executive management and control of the business and its policy, could not exercise their judgment in what seems to be a plain business proposition and take this risk, if it were otherwise deemed a good risk, and there is nothing to show that such was not the case. Moreover, this was not an exceptional case. Policies seem to have been issued to others, over sixty, notably in the case of Clagsens, concerning which no complaint is now made.

The commissions paid Sumner Cross on the Meyers policy was an irregularity. It seems to have been the only transaction of its kind, in the past, and nothing similar threatens the rights of these plaintiffs.

The payment of \$2,000 to Sumner Cross, not a member of the board or executive committee, by Mr. Moore, general agent, was a wrong on the part of both these individuals.

But I cannot understand that Mr. Moore was not entitled to the money in the first instance, and the action of the board, on discovering the facts, is evidence that there was no moral turpitude on its part. If there is any fault to be found with the managing officers it is, that some drastic steps were not taken in regard to both individuals.

Nor am I willing to say that the *quantum* of evidence necessary to connect F. G. Cross with this deal is present. In any event, I am at a loss to understand how this transaction, wrong as it was, affects or threatens the rights of these plaintiffs.

The claims in regard to failure to pay dividends and the claim as to lapses, seem to be matters largely of internal management. If another board can do better, the shareholders hold the remedy in their hands.

Equity will not concern itself in such matters, unless it clearly appears that positive misconduct and waste were the direct causes. I cannot say that the evidence justifies any such finding.

There are some other charges which I do not stop to mention. They are of a minor character, and they fall in the category of past transactions; they no longer threaten: and in no instance do they involve bad faith on the part of the managing officers.

Plaintiffs themselves, in the argument, practically ignore them, laying particular stress however upon certain transactions, which, though in a sense past, it is urged are present and continuing and

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threaten the rights and interests of plaintiffs. I refer now to the Interstate transaction; the Matthews transaction; the so-called special deposits; the Hansen claim; the death claims.

Before taking up these matters, turning to the prayer of the petition, we find it couched as follows:

"Plaintiffs pray that a receiver be appointed by this court to take immediate possession of the assets of this corporation with the usual powers; that the Columbia Life Insurance Company may be enjoined from transferring or otherwise disposing of its property or effects, and that it may be particularly enjoined from paying to said Felix G. Cross or his assigns the said amount of \$34,500, illegally and wrongfully claimed by him from said company; that after paying costs of reinsurance the policy holders of this company and all the debts of the corporation, the receiver pay over to plaintiffs and other stockholders such surplus as shall remain in his hands."

If the injunction prayed for should ultimately be granted, this action would be one for a receiver only. And a receivership being a provisional remedy only, and there being no action for a receiver, this court would be without power to appoint a receiver to practically wind up a corporation. *Cincinnati, H. & D. Ry. v. Duckworth*, 1 Circ. Dec. 618 (2 R. 518).

Particular attention may be called to the following language of Judge James M. Smith in *Cincinnati, H. & D. Ry. v. Duckworth*, which would seem to be applicable, page 624:

"The fact therein stated, that the former officers of the company had so fraudulently conducted its affairs as to cause great loss to it, and probably render it insolvent, and which had been negligently permitted by three of the present directors, while there was no pretense or claim that the present board, a majority of whom had no connection in any manner with such fraudulent acts, were not now conducting the business with the greatest wisdom and skill, obviously did not entitle the plaintiff, as a shareholder, to have a receiver appointed as prayed for, to take the possession and management of the defendant's railroad, and of all its business and affairs, simply that he might state an account thereof, and of the finances of the company, so that if it were necessary to sell, the court might so order, and make distribution of the proceeds according to law. This makes the appointment of the receiver the primary and principal object of the suit, and not an ancillary process of the court, necessary, to effectuate some other relief prayed for."

And again at page 627:

"The difficulty which presents itself to us is this: Do the facts as found, or the evidence in the case, show any necessity whatever for

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a resort to this extreme measure? Were any good reasons disclosed in either, to render it at all probable that the present board of directors would not at once, and in good faith, obey an injunction against them as actually entered by the court? If it be admitted that they have erred in judgment in the purchase of these claims against Ives, and the collaterals attached thereto, and have done that which the law forbids in such purchase, (and this is all that is found, and there is nowhere any finding of bad faith on the part of the directors in such acts), and the court enjoins them from such acts in the future, and forbids the payment, from the assets of the company, of obligations already contracted therefor, what is there in the case to raise the presumption that the order will not be obeyed? We are not able to see anything which will justify such an opinion. On the contrary, the fair and strong presumption, in the absence of anything suggesting the contrary, would be, that these directors, to whom the stockholders in this time of trial and peril, with knowledge of the facts, have entrusted their interests, and who are shown beyond all controversy to be men of great sagacity and wisdom in business affairs, and who apparently are justly entitled to the confidence of the community, in which they live, several of whom have in time past been connected with the management of the affairs of the company in the times of its highest and most extraordinary prosperity, and who are now well advised as to its interests, and all of whom appear exceedingly diligent in their efforts to bring about a better condition of things, would, as good citizens, obey any order the court might make, even if in their efforts to aid the company they have gone further than they should have done."

See, also, that the receivership must be ancillary to some other equitable relief. *Rapp v. Relief Co.* 30 O. C. C. 433.

Plaintiffs suggest however, that they may amend their petition, and ask for such other general equitable relief as the case may warrant (*Draper v. Moore*, 13 Dec. Re. 834; 2 C. S. C. 167), and it is intimated that an accounting may be necessary. This, however, would seem to fall within reasons given in *Cincinnati, H. & D. Ry. v. Duckworth*, *supra*, at page 624.

It is furthermore contended that a receiver would be necessary to make the injunction effective if that relief is to be granted. In short, that there has been such gross mismanagement and fraud (legal) that when the assets are compared with the liabilities, as a net result of the transactions above referred to, there is a deficiency of 40 per cent; and if not that, of from 20 to 40 per cent, in which event, it is claimed, the company is insolvent within the purview of the insurance laws of the state and so incapacitated from further transacting business; and further that the company is actually insolvent in the strict legal sense.

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That the court will therefore not only enjoin the illegal acts, but since it is evident the business cannot go on, that it will appoint a receiver to make the injunction effective, and conserve the assets for the benefit of the shareholders and policy holders.

This court has already determined that mere mismanagement is a thing that can be regulated by shareholders themselves within the corporation, and that unaccompanied by fraud it is not sufficient to warrant a receiver. *Goebel v. Brewing Co.* 2 Dec. 377 (7 N. P. 230).

In *North Fairmount Bldg. & Sav. Co. v. Rehn*, *supra*, Judge Smith pointed out that where the acts complained of were free from moral turpitude there could be no receiver.

In view of these authorities, and the facts in this case, cases to which I have been cited by plaintiffs, involving acts of moral turpitude on the part of the directors, or the looting by them of the corporation, or where it was manifest that there was danger of instant loss notwithstanding an injunction (exception referred to in *Cincinnati, H. & D. Ry. v. Duckworth*, *supra*), or where the corporate business was abandoned, or was being carried on contrary to the purposes of the charter, or in contravention of law, or illegally, are not applicable unless by analogy where, as is claimed here, that the past and present fraudulent (constructive) acts of these managing officers have absolutely incapacitated the company to the extent that it can no longer carry out the objects for which it was incorporated, and that no future is apparent for the company.

From what has already been said, it is manifest that this is not a case involving actual fraud, or looting, or abandonment, or attempt to carry out an illegal purpose, or an attempt to do an unlawful business. Indeed, actual fraud is expressly disclaimed. While the evidence, it is true, shows some irregularities, nothing appears from which the court could say otherwise than that the board of directors and the executive committee were always actuated by the best motives and for the best interests of the company, though they may have made mistakes in judgment and may have even undertaken to act illegally, on which I now express no opinion.

But what does the testimony show as to the claims of mismanagement and fraud (legal) ?

(a) Have the managing agents by mismanagement and fraud rendered this company insolvent under the insurance laws to the extent that they are no longer able to carry on the business ?

(b) Have they rendered the company insolvent in a strict legal sense ?

The first proposition involves a consideration of Sec. 274 Rev. Stat. :

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“When it appears to the superintendent, from examination or otherwise, that the assets of any insurance company organized under the laws of this state after deducting therefrom all liabilities, including reinsurance, reserve or unearned premium fund computed according to the laws of this state, are reduced 20 per cent or more below the capital required by law, he shall require such company to restore such deficiency within such period as he designates in such requisition. In case such deficiency is more than 40 per cent of the capital required by law, it shall be unlawful for such company to issue any new policies or transact any new business until the superintendent of insurance issues to such company a license authorizing it to resume business, or until the court has rendered its decision in the case as provided in section two hundred and seventy-six Revised Statutes. In case such deficiency is more than 20 per cent and less than 40 per cent of the capital required by law and the officers of the company certify that the deficiency will be restored by the company, then it will be lawful for the company to continue business as before the issuing of the requisition for the term of thirty days from the date thereof, and if at the expiration of the thirty days any portion of the deficiency is not restored, the company shall not issue any new policies or transact any new business until authorized by the superintendent, or until the court has rendered its decision in the case as provided in section 276 Revised Statutes.”

It will be observed that this section does not confer any authority upon a court of equity to wind up the affairs of the corporation. The section is found in the chapter relating to the duties of the superintendent of insurance and its cardinal object seems to be protection to the public. See Sec. 275 Rev. Stat.

It will be observed, further, that this action is not instituted by the insurance commissioner, or superintendent of insurance, but is an action of shareholders and policy holders (creditors).

I find no authority whatever justifying the usurpation by shareholders, policy holders or creditors of this statute on an application of this character, to enforce the practical winding up of the company, and I do not think a court of equity is warranted by any of the provisions of said section, in enlarging its jurisdiction (*Morawetz, Corporations* (1 ed.) Sec. 657; *Cook, Stockholders* (2 ed.) Sec. 629; *High, Receivers* (2 ed.) Sec. 288), to wind up a corporation, in a suit by the shareholders or policy holders.

Section 274 Rev. Stat. gives a remedy at law for the abuses therein referred to, and it prescribes the particular legal remedy that is to be pursued. That the superintendent of insurance is the proper party to

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start Sec. 274 Rev. Stat. in motion, see *Ward v. Farwell*, 97 Ill. 593, 615, 616.

Nor is *Richardson v. Life & Acc. Ins. Co.* 28 Ky. Law Rep. 919 [92 S. W. Rep. 284], to which I am cited by plaintiff's authority, to the contrary. In that case the court simply held the policy holder was not compelled to wait until the official designated by a similar statute had proceeded. Enough is set out in the bare statement of the facts in *Richardson v. Life & Acc. Ins. Co. supra*, to show that the creditors were amply justified in invoking the equitable power of the court, independent of the statute, and the *ratio decidendi* was, that the creditors in the equity proceeding who first applied for a receiver, were not to be precluded because the attorney-general subsequently proceeded under the statute.

It would thus seem that Sec. 274 Rev. Stat. ought to be eliminated from further consideration. Even if this were not so, appreciating as I do, that the word "liabilities" as used in that act is not synonymous with the word "debt" (*Lally v. Farr*, 9 Dec. 119, 125; 6 N. P. 73), still I have very grave doubts whether a court of equity called upon to exercise its discretion (in an action in which the public is not presently concerned, but in which the court is concerned with the best interests of all the shareholders and policy holders) should interpret that term in the broadest possible sense and construe it to include the most contingent of liabilities. In any event, in an action of this character if a reasonable defense appears and such is shown here, the claim ought not be regarded as a liability.

To adopt the very broad construction urged by plaintiffs (it is pointed out that the amended statute omits the word "actual," leaving the word "liability" to stand alone) would put it within the power of a disgruntled and disappointed shareholder, by the mere assertion of a pretended claim, supported by evidence however flimsy, providing only the claim were made sufficiently large, to render insolvent on mere figures the most solvent company in the world on stubborn facts and thus throw it into the hands of a receiver and wreck the enterprise.

The doubts I have as to the application of Sec. 274 Rev. Stat. and also as to the construction sought to be placed on the word "liabilities" by plaintiffs are sufficient to cast out the Hansen claim (growing out of the Chicago suit and amounting to about \$65,000, including interest) as a liability and practically all of the other alleged "liabilities."

As was said by Judge Pugh in *Baker v. Fraternal Mystic Circle, supra*, page 582

"If plaintiff's counsel are sound in their interpretation of the term 'expenses,' \$8,300 of the mortuary fund has been used during 1893 and 1894 to pay expenses.

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"But there is a consideration which casts some doubt upon the soundness of their construction, and that would be enough to defeat the application for a receiver on this ground. It is not necessary to demonstrate that they are wrong in their interpretation; a doubt is enough."

Having thus eliminated the Hansen claim, the liabilities, if any, are certainly below the alleged 40 per cent clause referred to in Sec. 274 Rev. Stat. It is claimed that there were certain special deposits, namely, \$5,900, \$9,200, \$10,800, and that these were liabilities and debts of the company.

The testimony with reference to these alleged deposits, however, proves nothing of the kind. Plaintiffs themselves in brief admit that the testimony in regard to these so-called debts is not clear, but a court of equity will not grant a receiver unless a case of "persuasive clearness is proved" (*Baker v. Fraternal Mystic Circle, supra*), or unless one's claim of right is reasonably free from doubt. Alderson, Receivers 10, 11, Sec. 7.

Reading the testimony of Mr. Luken I find nothing from which I could say, with positiveness, that the sums of \$5,900, \$9,200 and \$10,800 are liabilities or debts in any sense. On the contrary, I think I am justified in saying that the evidence fails to show anything due and owing on such account.

In regard to the C. B. Matthews transaction, I fail to see how the Norwood Bank, which holds the note of Mr. Matthews, can look in law to any one save Mr. Matthews for its payment, and I do not think it is contended that it does look to the company. But plaintiffs ask me, as I understand it, as a substitute for proof, to invoke a recognized equitable principle and look through form to substance and declare this \$6,300 transaction a debt of the company.

I take it, however, that it would not be looking to the equities of the entire case, and that it would not be subserving the best interests of all to saddle upon all, if only for the purpose of this hearing, a debt which Mr. Matthews owes, acknowledges, and which he alone is legally obligated to pay.

If a commission (\$80) has been paid Blanton, on this transaction, and the evidence shows such is the fact, or, if the interest has been paid on this amount by the device of special salaries, and the evidence shows such is the fact, there is a way, I think, to recover these amounts, without the intervention of a receiver. I think, however, this intimation will suffice to deter further payments of interest on this Matthews transaction, although I understand, under the evidence, that nothing has been paid thereon since January 1, 1908.

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As to the death claims, the policies under which same are claimed, are not unconditional promises to pay.

There seems to be reasonable grounds according to the evidence for resisting those which are not paid. Some of these policies appear to be reinsured and consequently their liability to such extent is reduced *pro tanto*.

Another policy is covered by collateral, and in still another case the defense is that the policy lapsed before any legal claim thereon could have matured, and another policy is resisted on the ground of fraud. All of this appearing, I do not see how they afford any ground as debts or liabilities to declare a receiver necessary, especially, since it appears that the surplus at the end of December, 1907, was in excess of the total of such claims, provided, however, that the sum involved in the Interstate transaction is neither a liability nor a debt of this company.

Now this transaction grows out of the taking over by this company of about one million and a half of the Interstate Company's insurance. This was done or attempted to be done in the formal way prescribed by statute; whether the transaction was legal or not, I do not now determine. The agreement, Exhibit 15, *inter alia* recites:

"It appears to said commissioner that the payment by said the Columbia Life Insurance Company to the said Interstate Life Insurance Company of \$25 per \$1,000 on insurance of said the Interstate Life Insurance Company, in pursuance of said contract, would impair the capital of \$100,000 of the Columbia Life Insurance Company. Thereupon said Felix G. Cross submitted to said commissioner a paper writing, certifying that none of the assets of the said the Columbia Life Insurance Company would be used in payment of any sums to be paid under such contract by said the Columbia Life Insurance Company to the said the Interstate Life Insurance Company; that all funds required to pay the said the Interstate Life Insurance Company in carrying out the said contract will be advanced by the said Felix G. Cross to the said the Columbia Life Insurance Company without any liability of said company to him for such advancement, but with the expectation of reimbursement to him only from surplus contributed to the said the Columbia Life Insurance Company by persons, whom in the future may purchase stock in such company which said paper writing is hereto attached, on condition that none of the assets of the said the Columbia Life Insurance Company shall be paid to said the Interstate Life Insurance Company, and on condition that funds necessary to pay the said stipulated price of \$25 per \$1,000 of insurance in force will be paid as aforesaid by said Cross, the said contract of reinsurance is by

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said commissioner hereby approved, subject, however, to the following modifications:

"Said the Columbia Life Insurance Company shall be directly liable at the suit of and to the policy holders of said the Interstate Life Insurance Company upon any and all claims arising under the policies of the said the Interstate Life Insurance Company for which the said the Columbia Life Insurance Company may be liable under such contract."

Dr. Cross advanced the necessary \$40,500 without any liability to the company, and the company received a very valuable asset in the Interstate business.

Now, the directors realizing this company acquired the benefit of the Interstate business and believing the Cross advance to be a moral obligation of the company, undertook in good faith by a method called "special salaries" to reduce the amount of this advancement to \$34,500 (exclusive of \$2,000 Sumner Cross commission, and with regard to which sum I do not understand how plaintiffs can complain).

They voted special salaries to certain officials and they applied the amount so voted on this advance as part payment. While it is conceded by plaintiffs that the amount voted to each officer added to the actual salary now received by such officer, does not render the particular official's salary excessive, nevertheless, in view of the contract above referred to, I do not think this action of the managing officers was proper even if the directors believed in good faith that it was the proper thing to do. It was an evasion of the conditions of the contract which permitted the taking over by the company of the Interstate business, and that advance of Cross, if it is to be paid at all, must be paid in the manner therein specified and in no other way. But shall this court in the exercise of the discretion invested in it be guilty of the same wrong, and undertake to circumvent the provisions of that agreement by declaring this \$40,500, or as it now stands, \$34,500, to be a liability or debt of the shareholders—of this company—merely because of some allegations in one part of the answer of these defendants by which it seems to be admitted that this is a debt, although in another part of the same answer it is unequivocally stated that it is an indebtedness of Cross? Or shall I declare it a debt or liability merely because the executive committee "deemed it wise to pay it" and issued a check therefor (January, 1908), subject to the approval of the board, which check, however, the board of directors promptly refused to pay and ordered canceled?

Once before in the history of this company some \$9,000 on account of this advance was paid by a method other than that contemplated by the agreement referred to. The insurance commissioner became

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cognizant of the fact. Did he with the interest of the public in mind regard the entire \$40,500 as a matured debt or a liability? Certainly not. He simply did what he doubtless will do again with reference to the amount advanced as special salaries. He ordered the \$9,000 paid back, and it was paid back.

Plaintiffs in this case earnestly pray that the company be enjoined from paying Felix G. Cross or his assigns \$34,500 illegally and wrongfully claimed by him from said company.

But in the argument on this motion they ask me to consider it as a debt or liability and to hold the capital stock impaired *pro tanto*.

If the injunction should be granted as prayed for on the ground it was neither a liability nor debt, it would seem to me to be somewhat of a paradox if a receiver were to be appointed at this time on the ground it is a liability or debt.

Again, if I hold this to be a debt now, then surely there could be no ground upon which to order an injunction. In such event, what becomes of the argument that the injunction here is the ultimate relief, and that a receiver is necessary to make same effective?

Or if it be the argument of plaintiffs that because of the alleged admissions of defendant in their answer, and because of past and present fraud they fear the \$34,500 will be paid by other devices and shifts. I would say, following the example of the circuit court in the Duckworth case, that this court is satisfied, considering the personnel of the board, that this will not be done pending the hearing on injunction. And if on hearing an injunction should appear to be necessary, and that remedy of equity would be sufficient to prevent the payment of the Cross advance, and there is no reason to believe such order would not be obeyed, it would not be necessary to appoint a receiver and practically wind up this company. 5 Pomeroy, Eq. Jurisp. 121, note 271.

But as nothing has been done by way of payment on this account since January of this year, and as no evidence is offered to prove that an attempt is about to be made to pay same, and as the evidence completely fails to show that Dr. Cross is pressing for payment, or that anything is due and payable thereon, I see in this no "pressing apparent necessity" calling for the appointment of a receiver.

The capital stock and the legal reserve of this company is intact. The company has \$4,600,000 business on its books. If this business is worth from \$35 to \$40 a thousand, as already pointed out, and this testimony is not denied, this is a very valuable asset and, in the ordinary sense of the word, the company makes a clear showing of solvency.

The actuary (Mr. Hyde) testifies that all the debts of the company have been paid as they matured in the ordinary course of business.

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This being so, this company is also solvent in the strict legal sense. *American Hosiery Co. v. Baker*, 10 Circ. Dec. 219 (18 R. 604); *Mitchell v. Gazzam*, 12 Ohio 315.

The case of *Chicago Life Ins. Co. v. Auditor of Public Accounts*, 101 Ill. 82, 92, to which I am cited by plaintiffs, might be authority as to what constitutes insolvency of an insurance company under proceedings properly instituted under a section similar to Sec. 274 Rev. Stat., but has no application in a proceeding of this character.

As an additional argument on the company's inability to proceed, it is claimed that the company is now precluded by virtue of an Illinois statute from doing business in Illinois because of the removal by its attorneys of the Hansen suit to the United States court. It may be that the facts may not bring the case within the terms of the statute, but I think I need only say now that this expulsion statute of Illinois does not seem to be automatic. The question is not yet determined, and therefore it does not appear that this company is already excluded from that jurisdiction, nor does it appear that it necessarily will be.

Nor does the fact, if it is a fact, that this company is not doing any new business because of alleged withholding of its license by the insurance commissioner, prove that the company cannot or will not ultimately proceed, or that the company is doing business unlawfully.

If I may not consider the provisions of Sec. 274 Rev. Stat. with reference to determining "liabilities" as therein specified, then certainly I ought not consider a particular clause therein to support a finding to the effect that the company is doing business unlawfully.

I find nothing in the facts or in the law that would justify me in now saying that this company is doing business unlawfully. While the evidence discloses irregularities, as I have pointed out, I fail to find any substantial ground on which a court of equity having an eye single to the interests of everybody in this case can appoint a receiver as prayed for.

The application for a receiver is accordingly refused.

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ANNEXATION—COUNTIES—INJUNCTIONS—MUNICIPAL CORPORATIONS.

[Ashtabula Common Pleas, August 15, 1908.]

FRED SHIPBAUGH ET AL. V. ELLIOT KIMBALL, REC., ET AL.

1. TRANSCRIPT OF MUNICIPAL ANNEXATION PROCEEDINGS FILED WITH CITY CLERK AND NOT COUNTY RECORDER.

The requirements of Sec. 1590 (Lan. 3054; B. 1536-32) Rev. Stat. *et seq.* as to filing with the municipal clerk the transcript of the proceedings of county commissioners upon application of citizens to annex territory to the municipality, apply to proceedings under Sec. 1599 (Lan. 3063; B. 1536-41) Rev. Stat. to annex territory upon application of the corporation itself, and injunction will lie to prevent a county recorder, to whom the proceedings have been certified from making record thereof.

2. FINANCIAL INTEREST OF MAYOR IN TERRITORY ANNEXED INVALIDATES ORDINANCE.

Under Sec. 125 of the Mun. Code of 1902, imposing upon mayors the impartial and disinterested legislative function of approving or vetoing ordinances, etc., an ordinance approved by the mayor, authorizing the annexation to a municipality of territory in which he has a strong financial interest, is clearly invalid as against public policy.

3. RECORD OF ANNEXATION ENJOINED FOR MISINTERPRETATION OF JUDICIAL DUTY OF COMMISSIONERS.

County commissioners in the determination of an application to annex territory to a municipality under Sec. 1599 (Lan. 3063; B. 1536-41) Rev. Stat. *et seq.*, act in a judicial character; and courts have no jurisdiction to pass upon the question upon its merits, or to review their proceedings except upon affirmative action on the application. Hence, where such commissioners, acting in good faith, grant an application to annex merely upon the fact of passage of an ordinance authorizing the annexation, especially if enacted upon their suggestion to obviate their opposition to the project, they misinterpret their judicial functions, and injunction will lie to prevent record of such annexation.

4. INJUNCTION RESTRAINING RECORD NOT BAR TO NEW PROCEEDINGS TO ANNEX.

Injunction to restrain record of annexation of territory to a municipality for failure of the board of county commissioners to give requisite judicial consideration to the questions and interests involved will not under Sec. 1592 (Lan. 3056; B. 1536-34) Rev. Stat. bar new proceedings thereon.

[Syllabus approved by the court.]

Herbert Williams and Hoyt, Munsell & Hall, for plaintiffs.

F. R. Hogue and McGiffert & Ullman, for defendants.

HOLE, J.

In this case the plaintiffs, Fred Shipbaugh, et al., have entered suit against Elliott Kimball as recorder of the county of Ashtabula, seeking to enjoin said official or his successors in office from making a record of certain proceedings for the annexation of territory to the city of Ashtabula.

It is alleged that two of the plaintiffs are residents and freeholders of lands within the territory sought to be annexed, and that the plaintiff, Salisbury, is a resident of the sewer district in the city of Ashtabula lying contiguous to said territory.

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The plaintiffs claim the right to maintain this proceeding by virtue of certain sections of the Ohio statutes relating to the incorporation of municipalities, and to the annexation of additional territory to such municipalities.

Without reading the petition in full it may be observed that it is claimed that there is error in the proceedings for the annexation of said territory in various respects, including the proceedings before the city council of Ashtabula, and also errors in the proceedings of the commissioners of Ashtabula county in various respects, and the further claim is made that it is not right, just nor equitable that said annexation be made for many reasons, among others that the limits of said city of Ashtabula are already unreasonably large, and contain more territory than it can now keep in order, and has many miles of common dirt highways which are wholly unimproved, many of them being wholly impassable for teams and in a bad and unsafe condition.

The further claim is made that the population of said city is rapidly diminishing in numbers, and that for this reason there is no demand for additional property or buildings in said city.

It is further claimed that the annexation of said territory is not desired by the inhabitants of said city generally, nor by the resident and nonresident freeholders of land lying within the territory sought to be annexed; but that the same is desired and prosecuted solely as a real estate speculation by one H. D. Cook, who is now mayor of Ashtabula, and one C. E. Zeile. That said Cook and Zeile in the years 1906 and 1907 purchased a large tract of land in said territory, and have since been trying to get the same annexed to the city in furtherance of their speculative projects, and against the wishes of almost all the inhabitants and owners of property in said territory.

The petition then gives the history of former attempts which are alleged to have been made by the said Cook to procure the annexation of said territory on petition by resident landowners, and the failure of said proceedings.

It is further alleged that the said Cook then presented to the city council of Ashtabula a petition purporting to be signed by resident freeholders of said territory sought to be annexed, and that the said council acting solely by their request, and influence of said H. D. Cook, immediately suspended the rules and passed said ordinance without argument, and without any consideration of its merits; without giving other persons any opportunity to be heard, and the petitioners attach a copy of said petition and ordinance to the petition in this case.

It is further claimed that when the petition prepared by the solicitor in accordance with such ordinance was presented to the county commissioners, that the said commissioners did not give said matter any consideration; but said commissioners had promised and agreed with said

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Cook that if he could and would get an ordinance passed by the city council of Ashtabula, to annex said territory, they, the said board of county commissioners, would ratify the same, and authorize said annexation without delay, and that said commissioners committed error therein, because they assumed that said city council was of equal or superior authority with themselves, and by reason thereof and of said agreement with said Cook they refused to reverse or review said action of said city council.

The city of Ashtabula, on its own motion, has been made a party defendant, and though no answer has been filed, it has appeared by counsel, and has been permitted to offer evidence as though a general denial had been filed to the petition.

This proceeding is a statutory one, but there seems to be a little uncertainty as to the law governing this case, for the reason that there are cross references from one statute to another, requiring that proceedings shall be had in all respects, "so far as applicable."

Section 1599 (Lan. 3063; B. 1536-41) Rev. Stat. provides "When the inhabitants generally of any municipal corporation desire to enlarge its corporate limits by the annexation of contiguous territory, it shall be done in the manner hereinafter specified."

Section 1600 (Lan. 3064; B. 1536-42) Rev. Stat. provides that "The council * * * by a vote of not less than a majority of the members elected, shall pass an ordinance authorizing such annexation to be made, and directing the solicitor of the corporation, or some one else to be named in the ordinance, to prosecute the proceedings necessary to effect such annexation."

Section 1601 (Lan. 3065; B. 1536-43) Rev. Stat. provides for the filing of a petition by the corporation, with the county commissioners, to be accompanied by an accurate description of the territory and an accurate map thereof.

Section 1602 (Lan. 3066; B. 1536-44) Rev. Stat. provides "When such petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as are required under the provisions of subdivision one of this chapter."

Subdivision one contains the sections providing for annexation of territory on application of its citizens, and by Sec. 1590 (Lan. 3054; B. 1536-32) Rev. Stat., it is provided that "Such petition shall be presented to the board of commissioners, and when so presented the same proceedings shall be had, in all respects, as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as are required in the case of an application to be organized into a village under the provisions of this division; and the final transcript of the commissioners, and the accompanying map or plat and petition, shall be deposited with the clerk of the city or village to which

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such annexation is proposed to be made, who shall file the same in his office."

Section 1591 (Lan. 3055; B. 1536-33) Rev. Stat. provides, "At the next regular session of the council of such city or village, after the expiration of sixty days from the date of such filing, the clerk shall lay the transcript and the accompanying map or plat and petition before the council; and thereupon the council shall, by resolution or ordinance, accept or reject the application for annexation."

Section 1594 (Lan. 3058; B. 1536-36) Rev. Stat. provides "If the clerk, within sixty days from the filing of such transcript, * * * receive notice from any person interested that he has presented to the court of common pleas, or a judge thereof, a petition to enjoin further proceedings, the clerk shall not report to the council such transcript, map, or plat and petition filed with him, until after the final hearing and disposition of the petition so presented to such court or judge."

From these provisions of the statute, it would appear that the transcript of the commissioners should be deposited with the clerk of the city, rather than the recorder of the county as was done in the proceedings under consideration in this case.

The claim is made that the provision regarding the filing of papers with the clerk of the city is not applicable in a case where the corporation itself files a petition, and it is claimed that the cross reference from Sec. 1590 (Lan. 3054; B. 1536-32) Rev. Stat. to the other provisions providing for the application to be organized into a village should be applied to an application of this kind.

Section 1557 (Lan. 3032; B. 1536-10) Rev. Stat. of the chapter providing for incorporation of villages and hamlets provides:

"The hearing shall be public, and may be adjourned from time to time, and from place to place, according to the discretion of the commissioners, and any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition, and any affidavits presented in support of or against the prayer of the petition shall be considered by the commissioners, and the petition may be amended by their leave."

Section 1558 (Lan. 3033; B. 1536-11) Rev. Stat. provides:

"If the commissioners, upon such hearing, find that the petition contains all the matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described, and are not unreasonably large or small, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given as required, that there is the requisite population for the proposed corporation, and if, moreover, it seems to the commissioners right that the prayer of the petition be granted, they shall cause an

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order to be entered on their journal to the effect that the corporation may be organized."

Section 1560 (Lan. 3035; B. 1536-13) Rev. Stat. provides:

"The commissioners shall cause to be entered on their journal all their orders and proceedings in relation to such incorporation, and they shall cause a certified transcript thereof, signed by a majority of them, to be delivered, together with the petition, map, and all other papers on file, relating to the matter, to the recorder of the county, at the earliest time practicable."

Section 1560 (Lan. 3035; B. 1536-13) Rev. Stat. provides:

"The recorder shall file the transcript and other papers in his office, and at the expiration of sixty days thereafter, unless enjoined as hereinafter provided, he shall make a record of the petition, transcript, and map in the proper book of records, and preserve in his office the original papers delivered to him by the commissioners, certifying thereon that the transcript, petition, and map are properly recorded."

Section 1562 (Lan. 3040; B. 1536-18) Rev. Stat. provides:

"Any person interested may, within sixty days from the filing of the papers with the recorder, as above provided, make application by petition to the court of common pleas, or, if during vacation, to a judge thereof, setting forth the errors complained of, or the inaccuracy of the boundaries, or that the limits of the proposed corporation are unreasonably large or small, or that it is not right, just, or equitable that the prayer of the petition presented to the board of commissioners be granted, or containing any or all of such averments, and praying an injunction restraining the recorder from making the record and certifying the transcript, as above required."

Section 1564 (Lan. 3042; B. 1536-20) Rev. Stat. provides, among other things, that upon the hearing of said petition, "The court or judge may hear evidence upon the matters and things averred in the petition; and if, upon such hearing, no error is found in the proceedings before the commissioners, and no inaccuracy in the boundaries, and if the court shall further find that the limits of the proposed corporation are not unreasonably large or small, and that it is right, just and equitable that the prayer of the petition presented to the commissioners be granted, the petition for such injunction shall be dismissed; * * * but if error is found in the proceedings, or if the boundaries are found to be so inaccurately described as to render indefinite or uncertain limits or extent of the proposed corporation, or if the court shall find that the limits of the proposed corporation are unreasonably large or small, or that it is not right, just or equitable that the prayer of the petition presented to the commissioners be granted, then the court or judge shall make an order enjoining the recorder from making the record; provided

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that such order shall not be a bar to any subsequent application to the commissioners for the purpose of effecting such incorporation."

Neither the plaintiffs nor the city of Ashtabula, which was made a party defendant on its motion, has urged the fact that these papers were filed with the recorder rather than with the clerk of the city of Ashtabula, as a ground to be considered by this court in determining this case; but have each insisted that the matter should be heard fully upon its merits.

However, it seems that it is necessary that this question should be determined, and a careful consideration of the statutes above referred to leads to the conclusion that the papers should have been filed with the clerk of the city and not with the county recorder. It is suggested that the fact that the corporation filed the petition, after the city council had by ordinance declared in favor of the annexation, would make it unnecessary to have the papers returned to the clerk of the corporation to be laid before the council. It is clear, however, that the action of the council in passing the original ordinance only started the machinery in motion, and it is certainly right and proper that the final result of the application should be certified to the clerk of the city, to be by him laid before the council, and made a part of the records of the city that all concerned might be advised as to the enlarged limits of said corporation. Of course there would be nothing illogical in filing these papers with the recorder of the county, and yet the provisions for filing with the recorder are coupled with the procedure to be taken when a village is to be incorporated and named, and this provision for so filing with the recorder is not necessarily applicable in a case for the annexation of territory merely, and in as much as the procedure for the annexation of territory on the petition of inhabitants of such territory provides for the filing of the transcript and other papers with the clerk of the city, and this section is referred to as governing, "so far as applicable," in cases where the corporation itself files the petition, the court has reached the conclusion, as above suggested, that these papers should have been filed with the clerk of the city rather than with the county recorder. Nor is the court without precedent for so finding, for in the case of *Pollock v. Toland*, 25 O. C. C. 75, the circuit court of the eighth circuit, Judge Laubie of this circuit sitting as one of the trial justices, approved and confirmed proceedings in which the city of Cleveland had filed a petition for annexation of territory, in which proceedings the transcript and other papers from the commissioners were filed with the clerk of the city of Cleveland. So far as appears, from the report of that case, no question was raised as to the propriety of that procedure, but it seems to have been taken for granted by both court and council.

In view of the conclusion which the court has reached upon this proposition, it would seem that the plaintiff is entitled to an injunction

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restraining the recorder from taking further proceedings which would tend to confuse and mislead the board of county commissioners, as well as the general public; and for this reason the consideration of the further questions raised by the petition in this case would scarcely seem necessary.

In view of the manner in which this case has been tried, however, and because the court may be in error as to this question of the proper depository for said papers, it may be well to consider the other questions which have been presented by counsel.

It is claimed that the injunction should be allowed for many reasons, the chief ones which have been discussed being first, that the mayor of the city of Ashtabula has a large financial and property interest in having the proposed annexation made, and had such interests at the time that he, as mayor, approved the ordinance providing for such annexation.

Second, that the commissioners erred, or were guilty of misconduct in performing the duties devolving upon them, in this, to wit, that they based their finding almost solely upon the finding of the city council and that prior to the hearing they had practically assured the mayor of said city that they would take favorable action if the city council should pass an ordinance in favor of annexation.

Third, that it is not just or equitable that the proposed annexation should be made, for many reasons, among others that the proposed territory is too large, much of it being simply unoccupied farm land, that the city of Ashtabula already has a large amount of unimproved territory, that it has many miles of unimproved highways, variously estimated from seventy to one hundred and twenty-five miles of which only about seven miles have been improved by paving and only about twenty-two miles improved by sewers, and that the burden of maintaining additional streets with the duty of lighting and caring for the same, as required by law, would be placing an unreasonable burden upon the taxpayers of said city in view of the present high rate of taxes.

As to the first question suggested, that of the financial interests of the mayor, in the proposed annexation, it may be observed that the issue raised is very similar, though not identical, to the question passed upon by the court of common pleas and the circuit court of Cuyahoga county, in cases involving the validity of ordinances granting certain franchises for the construction of street railways in the city of Cleveland.

The legal questions raised in those cases were passed upon by Judge Phillips in a very exhaustive opinion in *Cleveland Elec. Ry. v. Cleveland*, unreported, and the doctrine which he enunciated was affirmed by the circuit court. In that opinion Judge Phillips says:

"In the whole realm of jurisprudence no principle is better estab-

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lished or rests on firmer foundation, than the one which forbids one occupying a fiduciary relation from placing himself in any degree in antagonism to his trust. Agents, guardians, executors, directors of corporations, officers of municipalities, and all other persons clothed with fiduciary character are subject to this rule. And this rule is accentuated in its application to the officers and agents of municipal corporations. The reason and propriety for accentuating this rule in its application to public officers are at once plain and strong. A public officer is one to whom is delegated some of the sovereign functions of government, to be exercised by him for the public benefit. He acts only for the public; and the public are represented in the instance only by him; and the theory upon which his acts bind the public is that his acts have the public sanction, because they are exclusively in the interest of the public."

In support of his conclusion Judge Phillips cites many authorities, among others Dillon, Mun. Corp. Sec. 444, as follows:

"It is a well established and salutary rule in equity that he who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based upon principles of reason, of morality and of public policy; it has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well regulated system of jurisprudence prevails. * * *

"The law will in no case permit persons who have undertaken a character or a charge to change or invert that character, by leaving it and acting for themselves in a business to which their character binds them to act for others. The application of the rule may, in some instances, appear to bear hard upon individuals who had committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity and to apply it to every case which justly falls within its principle. The principle generally applicable to all officers and directors of a corporation is that they cannot enter into contracts with such corporation to do any work for it, nor can they subsequently derive any benefit from such contracts. To deny the application of the rule to municipal bodies would, in the opinion of the Canadian Chancery Court, be to deprive it of much of its value, for the well working of the municipal system, through which a large portion of the affairs of the country are administered, must depend very much upon the freedom from abuse with which they are conducted."

Numerous cases might be cited to sustain this doctrine, which so far as this court has been advised, has never been questioned by any high

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authority. Without citing in detail I will simply refer to the following: *People v. Overysse Tp.* 11 Mich. 222, 226; *Grand Island Gas Co. v. West*, 28 Neb. 852, 855 [45 N. W. Rep. 242]; *Smith v. Albany*, 61 N. Y. 444, 447.

In the case at bar the plaintiffs offered evidence, which they claim would have shown more fully the connection of the mayor with the action taken by the city council, and the arbitrary manner in which the council so acted. This offer was objected to by defendants and the court at that time sustained the objection, and was possibly not warranted in so holding. During the progress of the trial, however, by examination of the mayor himself, as well as from the examination of other witnesses offered by the defendant, it appears, without contradiction, that the mayor is the owner of considerable land in said territory, for which he has paid many thousands of dollars, that he assumed to act as agent for the other owners of real estate in the territory sought to be annexed, his own statement being that he supposed he appointed himself as agent, that after the two successive petitions of property owners had been dismissed by the commissioners, he appeared quite incensed and to use his own language "he declared to the members of the board that he had been skinned and robbed" and had expended the sum of \$60, by reason of the said commissioners having assumed jurisdiction by reason of which considerable sums had been spent for giving notice of said application. That thereupon one or more of the commissioners assured him that if he would have the city council of Ashtabula pass an ordinance for the annexation, the board of commissioners would not oppose it, and would act promptly in the matter, or words to that effect. That thereupon the mayor employed a man to circulate a petition among the owners of land in that territory, and that he showed his interest in the matter to the extent that he deeded some land to an employe or care-taker, without any consideration paid except the sum of one dollar, and upon the day that the deed was executed, procured the said employe to sign the petition as an owner of land in said territory. As to whether or not the mayor took any definite steps to influence the action of the council, was not shown by plaintiffs in view of the holding of the court against their offer, and the mayor himself declared that he had taken no action whatever to influence their conduct.

Under the statute (Sec. 125 Mun. Code of 1902), however, the mayor must approve the ordinance in order to make it effective. He has a right to veto any ordinance, in which case it would require two-thirds of the council to pass it over his veto. As a public officer his duty was to act in the premises with entire impartiality and with an eye single to the interests of the municipality which he represented. After a careful consideration of this question the court has arrived at the conclusion

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that the ordinance, passed as it was and approved by the mayor in the light of his strong financial interest, was invalid for the purpose of authorizing the solicitor to take further proceedings, and therefore there was no proper petition to be considered by the county commissioners.

It is claimed by counsel for defendants that this view of the case would prevent the improvement of any street on which the mayor might own any piece of property. Without assuming to pass upon any hypothetical case, it may simply be observed that a court of equity might disregard some unimportant interest which a mayor might own in real estate to be effected by an ordinary street improvement where the scheme of the improvement provides that almost all the costs shall be assessed upon the abutting property, but be that as it may, it is apparent, even from the evidence adduced by the defendant itself, that this entire plan for annexation was largely devised by the mayor, and would not have been urged upon the commissioners or the council had it not been for his active interest in the matter, and an ordinance so passed is clearly invalid as against public policy.

In speaking of the ordinance passed by the city of Cleveland Judge Phillips makes this statement which it seems to me is entirely applicable, in principle, to the case at bar.

"I suppose that strictly speaking such grant by the city officials would be *intra vires*. Its invalidity would not come from want of corporate capacity; it would come from the vires of corruption and fraud from dereliction of official duty, from bad faith in a trust relation, from antagonism of personal interest and fidelity to the public interest. Such transaction would contravene public policy, which Mr. Greenleaf says is a principle of the law which "secures the people against the corruption of justice or the public service, and places itself as a barrier before all devices to disregard public convenience."

Concerning the second question suggested, as to the misconduct or misinterpretation of their duty by the board of county commissioners, it may be said that while the board undoubtedly acted in good faith, and although the court finds that there was no intention to do anything that was wrong or dishonest, it is clear that they misapprehended the judicial character of the duty which they had to perform. While the evidence will scarcely warrant the conclusion that there was any definite promise or agreement between them and Mayor Cook, as charged in the petition, the fair import of the testimony of these commissioners themselves, together with the testimony of the witnesses, adduced by the plaintiff upon this issue, is that they suggested to the mayor, that if the city council would first act, they would not further oppose the project of annexation. And the fair import of the testimony of the commissioners is, that when the petition of the city of Ashtabula came before them, they felt there was nothing else they could do but to grant it,

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and that at least one or more of the commissioners sets aside his own individual judgment in the premises in favor of the action taken by the city council.

But is this such error as may be taken advantage of in the manner attempted to be done by the petition in this case? This error, if it may be called an error, is not shown by the record of any proceedings which were had before the county commissioners, but has been disclosed by extrinsic evidence admitted by the court, over the objection of the defendant city, to sustain the allegations of the petition.

The statutes make no definite provision by which a bill of exceptions may be taken in proceedings before the board of county commissioners, and so far as the statutory provisions are concerned, it seems that the court is left only to examine the transcript of journal entries, etc., as certified by the board of commissioners.

If we are to consider, however, that the court of common pleas upon this petition is to consider the justice and equity of this annexation, can the court consider the issue made as to the conduct of the commissioners as bearing upon this question of justice and equity? It must be noted that this court is not the original tribunal to pass upon the question of annexation. The board of county commissioners must pass upon the issues of fact raised as to whether or not such annexation should be allowed, and they are bound to consider, not only the needs of the city but also the rights of the owners of property in the territory sought to be annexed. Their duty is of a judicial character and requires that they should consider it from the view point of all the parties interested, and all these parties have an absolute right under the statute to have the deliberate judgment of this tribunal before it is taken to any other tribunal. If this tribunal, the board of county commissioners, refuse to grant such annexation, this court has no power to review their holding and to grant an annexation. It is only when they have acted favorably that any person interested has a right to appeal to the court of common pleas. And while this court may set aside their affirmative action, or may approve what they have done, it has no original power to pass upon the question on its merits.

Therefore it is clear that all parties interested have a right to the proper consideration of the question on its merits, by this first tribunal, and while it is doubtful whether the question as to the misapprehension of their duty by the board of commissioners can be considered technically as an error in the proceedings, this court has reached the conclusion that justice and equity require that the question should be first fully and fairly considered by that tribunal, and because the testimony shows that they failed to give it such fair consideration, the prayer of the petition ought to be granted.

Holding the views thus expressed as to the duty of the court to grant

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the prayer of the petition, it would seem unnecessary for the court to determine in detail on the merits, whether or not the annexation of the proposed territory ought to be made, considering the interests both of the city and of the owners of land in such territory.

Under the statutes, the determination of this case is no bar to new proceedings to be taken. And as this matter may later come up for consideration, on other proceedings, it scarcely seems necessary or advisable for this court to make a finding which might be insisted on as a precedent hereafter.

The trial judge, upon the evidence presented, has formed an opinion upon the merits of the case, but such an opinion would seem to be immaterial, unless the counsel for defendant insist upon their request for a separate finding of fact and of law, in which event this court is of the opinion that they would be entitled to such finding.

The question as to whether this separate finding shall be insisted upon is therefore left to counsel for defendant, and if insisted upon, the trial judge will prepare and file a separate finding of law and of fact.

The entry in the case will be, "Trial to court, perpetual injunction allowed as prayed for, and costs assessed against the defendant, the city of Ashtabula," in as much as the recorder has no more than a nominal interest in the issues involved.

CRIMINAL LAW AND PRACTICE.

[Coshocton Common Pleas, December 21, 1907.]

*STATE V. BENJAMIN DICKERSON.

1. COURT'S DUTY TO SECURE JURORS HAVING NO SETTLED OPINION AS TO GUILT OR INNOCENCE OF ACCUSED.

Courts in the trial of criminal cases and in the administration of criminal law, regardless of the rule that one is qualified to sit as a juror therein who states he can lay aside a formed opinion as to the guilt of the accused and render a fair and impartial verdict based alone on the evidence and charge of the court, are bound to secure jurors that have not a settled belief as to either the guilt or innocence of the defendant.

2. MOTION FOR CHANGE OF VENUE SHOULD BE GRANTED IF FAIR AND IMPARTIAL TRIAL CANNOT BE FOUND.

A motion for change of venue under Sec. 7263 Rev. Stat. should be ordered if it appears from the evidence offered in support of the motion, that it is improbable accused can secure a fair and impartial trial or an unbiased or unprejudiced jury in the county of his residence.

[Syllabus approved by the court.]

HEARD on affidavits and testimony.

J. L. McDowell, Pros. Atty., James Glenn and T. H. Wheeler,
for plaintiff.

*Error not prosecuted; for opinion on plea in bar, see *State v. Dickerson*, post. 48.

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J. C. Adams and J. C. Daugherty, for defendant.

WICKHAM, J. (Orally.)

The defendant has filed a motion, under Sec. 7263 Rev. Stat., for a change of venue. Section 7263 Rev. Stat. reads as follows:

"All criminal cases shall be tried in the county where the offense was committed, unless it appear to the court, by affidavits, that a fair and impartial trial cannot be had therein, in which case the court shall direct that the person accused be tried in some adjoining county."

The purpose of the inquiry in such cases is to determine whether a fair and impartial trial of the defendant can be had in the county in which the crime is alleged to have been committed. By that we understand, a trial by an unbiased jury; a jury that goes into the jury box without prejudice or bias. That is what it means.

Counsel have referred to a case decided by Judge Pugh, in Franklin county, some years ago—the case of *State v. Elliott*, 11 Dec. Re. 253 (25 Bull. 366). The first paragraph of the syllabus is:

"1. To authorize a change of venue in a criminal case, on the motion of the defendant, he must prove, by clear, explicit and convincing evidence, that a fair and impartial trial in the county where the indictment was found, cannot be obtained."

With all due respect for the opinion of Judge Pugh, we have some doubt about that being a correct proposition of law. That would amount to little short of evidence beyond a reasonable doubt, if any short of that—"by clear, explicit and convincing evidence, that a fair and impartial trial in the county where the indictment was found, cannot be obtained."

The second paragraph of the syllabus reads:

"2. Newspaper denunciations of the defendant and of his alleged crime, are not alone sufficient to warrant a change of venue.

"3. It is no abuse, but may be a wise exercise, of the discretion conferred by the statute, for the court to postpone, or overrule, for the time being, the motion, till it is ascertained by an examination of jurors whether a constitutional trial can be had."

It appears from the footnote that this opinion was approved by the Supreme Court. As an authority, it is somewhat crippled from the fact that Judges Bradbury and Minshall dissented from the judgment of the court. So, it appears that three of the members of the Supreme Court approved the opinion, and two disapproved it.

Our understanding is, that if it appears from the evidence offered in support of the motion to be improbable that the defendant can secure a fair and impartial trial, or an unbiased and unprejudiced jury—if it should so appear—then I think it would be the duty of the court to order a change of venue.

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I might say that I came here today with the impression that the state of the public mind of this county is against the defendant; I was here on a former occasion, which counsel remember, and I think I received an impression at that time to that effect, probably from what was said by the county commissioners at their session, which we all attended; but, from the evidence which has been offered here, we must determine the matter; and I think the court is capable of taking the evidence offered at this hearing, without being biased by any impression received heretofore, and determine this question.

It appears from the affidavits filed by defendant's counsel that the press of this county at the time, before and since the former trial, published a great many articles that were very damaging to the right of the defendant to a fair and impartial trial. We must assume that the people read the newspapers, and we also have a right to presume that the reports published by the newspapers made some impression upon the people who read them. There is no doubt about that. Every-day experience teaches us that.

Judge Pugh says, in his opinion, which we may regard as an authority here, on that point, that newspaper denunciations of the defendant alone will not afford sufficient ground for a change of venue. But we should go further, and inquire as to what effect the newspaper articles published in this city had upon the public in this county. The circulation of the papers, it appears, was very large. In some of the affidavits filed by the state it is stated that the spectators at the former trial were quiet and decorous, orderly and well-behaved, and in the same affidavit it is stated that the court frequently cautioned the audience.

I have been on the common pleas bench in all about six years, and have presided at some cases where we had very large audiences—a couple of murder cases, and some other cases that were of interest to the people where they were tried, and they attracted large audiences; and I do not know that it was ever my experience that the court was called upon to admonish a quiet, decorous and orderly audience. So, it would seem, from the statements in the affidavits themselves, that there was some reason for the court's admonition to the audience, and that if they had been quiet and orderly, there would have been no occasion for the court to admonish or caution them. But, however that may be, we do not think that is a matter that is very material.

Now these witnesses who testified—some of them speak directly as to the matter; take the testimony of the county commissioners; one of them is the same man who made a statement at my former visit, a few days ago, and his statement is that 90 per cent of the people in the county believe the defendant to be guilty; that they have a settled conviction or belief that the defendant is guilty of the crime with which

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he stands charged. I do not know of anybody who would be more capable of judging the state of the public mind than the county commissioners. Their duties call them to all parts of the county; they go out and talk to the people; they come in contact with them; they know what the people are talking about; what they are saying, better, probably, than any other public officer of the county; and so, for that reason, the opinions and statements of the county commissioners are probably entitled to more weight than the opinions of most other men.

Now, if it is true that 90 per cent of the people of the county have settled opinion or belief that the defendant is guilty, how is it possible. I will not put it that strong, but is it probable, that an unbiased jury could be obtained to try the case? It is not, as some of the witnesses seem to think, whether there is a *possibility* of finding twelve men who would be unbiased and unprejudiced. It is not that; but is it probable, by the usual mode of securing a jury in the trial of a murder case, to get a jury who had not formed or expressed a settled opinion as to the guilt of the defendant? It appears to the court, from the testimony of the witnesses, that it would be altogether improbable.

As to the opinions of the witnesses, expressed by the persons who made the affidavits, they are no doubt honest in their opinions, and they say that they think that the defendant could have a fair and impartial trial. They go so far as to say orally that they think, if a person were called, no matter how firm a belief he had before of the guilt of the defendant, that he could lay it all aside and, from the evidence alone, render a fair and impartial verdict. Well that is possible, but hardly probable; and to be compelled to call such men to sit in judgment is not what the law contemplates. The Supreme Court says that if a man says that he has formed an opinion, yet, notwithstanding that, if he says that he can lay his opinion previously formed aside and render a fair and impartial verdict from the evidence, and that alone, he is competent to sit as a juror in the cause; but, in the trial of a criminal case, and in the administration of criminal law, it ought to be the duty of the court to secure a jury that has not a settled belief or opinion one way or the other of the guilt or innocence of the defendant. I do not regard the opinions of these men, as disclosed by the affidavits, without stating any facts to base them on, as of very great weight; and when counsel for the defendant came to interrogate them upon what they predicated their opinions, it appears that they have gone into or approached the domain of metaphysics to some extent, and they say that they think, after examining their own mind, that they could lay aside the conviction previously formed and could render a fair and impartial verdict from the evidence alone.

Our conclusion is, that it is only justice to the defendant that the

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motion should be granted, and a change of venue ordered. It is no insult to the people of Coshocton county, as counsel has suggested in argument. If that is so, there would be an insult to the citizens of every county in which a change of venue was had, and it would be an insult for the legislature to pass an act authorizing a change of venue. Counsel are mistaken about that. There is no reflection upon the people of this county. The evidence shows that this case has been talked about to that extent in this county, that it would be very difficult at least to secure an unbiased jury in the county. I live in a county somewhat smaller in population—26,000. Coshocton county has about 28,000 people; it is about the size of this county, and we know to what extent a case of this character would be talked about by the people of the community. There is hardly a man, or woman or child in the community who would not talk about it, and discuss every detail of it, if the evidence on the trial had been published in the newspapers, and circulated widely.

Motion for change of venue granted, and change of venue ordered to Holmes county. It will be the duty of the clerk, under Sec. 7265 Rev. Stat., to at once issue a warrant to the sheriff to transfer the prisoner to Holmes county.

AUTREFOIS ACQUIT—CRIMINAL LAW.

[Holmes Common Pleas, January 13, 1908.]

*STATE V. DICKERSON.

PLEA IN BAR NOT MAINTAINABLE UPON REVERSAL AS TO COUNTS TO WHICH JURY WERE SILENT.

The reversal of the judgment in a criminal case places the state and defendant in the same position they occupied before the trial; and where a defendant secures a reversal of a verdict, which was silent as to the first and second counts and found him guilty under the third count of the indictment, he cannot thereafter maintain a plea in bar to the first and second counts.

[Syllabus approved by the court.]

J. L. McDowell, James Glenn and T. H. Wheeler, for plaintiff.
J. C. Adams, J. C. Daugherty and R. M. Voorhees, for defendant.

WICKHAM, J. (Orally.)

Indictment for murder in the first degree.

This cause is submitted to the court on a demurrer filed by the state of Ohio to a plea in bar filed by the defendant. A brief statement of the facts as shown by the plea in bar is:

That at the January term, 1906, of the court of common pleas of Coshocton county, Ohio, the defendant was placed upon trial on an

*Error not prosecuted; decision on motion for change of venue, see *State v. Dickerson*, ante, 44.

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indictment containing three counts. The first count of the indictment charges the defendant with murder in the first degree, with deliberate and premeditated malice; the second count charges murder in the first degree, while perpetrating rape; the third count charges murder in the first degree, while attempting to perpetrate a rape. The trial resulted in a verdict of guilty of murder in the first degree, while attempting to perpetrate a rape, under the third count of the indictment.

Afterward, on April 15, 1906, the defendant filed a motion, thereby moving the court to set aside the verdict of the jury for errors of law committed by the court and in the trial of the cause, in the admission and rejection of evidence, and in the court's charge. This motion was overruled and a judgment rendered on the verdict.

The defendant thereupon filed a petition in error in the circuit court of Coshocton county, for a reversal of the judgment. The circuit court, at its October term, 1906, reversed the judgment of the court of common pleas, for errors assigned in the record and in the motion for a new trial, and remanded the cause to the court of common pleas for a new trial. Thereupon the prosecuting attorney for Coshocton county prosecuted error in the Supreme Court, and in October, 1907, the Supreme Court of Ohio affirmed the judgment of the circuit court.

The defendant claims for the plea in bar that it shows he was acquitted of the crime of murder as charged in the first and second counts of the indictment by the verdict of the jury, and that he cannot now be put upon trial on those counts, or either of them; that to compel him to be placed upon trial on those counts would be a violation of Art. 1, Sec. 10 of the bill of rights, which provides that no person shall be twice put in jeopardy for the same offense.

The verdict of the jury did not in express terms acquit the defendant of the crime charged under the first and second counts of the indictment, but it is claimed by counsel for the defendant that the verdict's silence on those counts is equivalent to a verdict of not guilty, and this view is sustained by authorities cited. It will, therefore, be assumed in the consideration of this question, that such was the verdict of the jury.

This brings us to the question whether the plea of *autrefois acquit* is available to the defendant.

Hurley v. State, 6 Ohio 399, is one of the early adjudications of our Supreme Court. In that case the indictment charged Hurley with murder in the first degree in one count, murder in the second degree in the second count, and of manslaughter in the third count. He was put upon trial and the jury after a time stated to the court that they had agreed that the defendant was not guilty on the other counts. The

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court thereupon discharged the jury, on motion of the prosecuting attorney and against the consent of the defendant.

At a succeeding term the defendant filed a plea in bar on the ground that he had been acquitted of the charge of murder in the first degree, to which a demurrer was filed by the state. On the question thus made the Supreme Court said, page 404:

“A verdict in either a civil or criminal case must be considered an entire thing. It must respond to the whole declaration, and to every count in the indictment, or the court cannot legally receive it as the verdict of the jury. * * * In this case the record shows that the jury could not agree on a verdict on the two last counts in the indictment; and having agreed on the first was no reason why the verdict should have been received. It was in law no verdict, and the court did not err in rejecting it altogether.”

In the case at bar the circuit court reversed the judgment of the trial court and set aside the verdict for errors appearing on the record of the case. It was an invalid verdict and judgment. An invalid verdict is no verdict, and is equivalent to a disagreement of the jury on the count on which it is returned.

But it is claimed by counsel that the case at bar is to be distinguished from this authority, and it must be conceded that the facts are quite dissimilar. Here the three counts of the indictment each charged murder in the first degree. In *Hurley v. State, supra*, the counts of the indictment charged crimes of different degree; but would not the general analogies of the law require the same ruling or decision in the one case as in the other?

A case of similar character in its facts is *State v. Behimer*, 20 Ohio St. 572. Behimer was put upon trial on an indictment charging murder in the first degree in a single count. A jury found him not guilty of murder in the first degree but guilty of murder in the second degree.

The defendant thereupon moved the court to set aside that portion of the verdict finding him guilty of murder in the second degree and for a new trial. The court sustained the motion and set aside the verdict and granted a new trial. At the next term of the court a plea in bar was filed, setting forth the verdict at the previous term in bar of his further prosecution on the indictment charging murder in the first degree. The state demurred and the court overruled the demurrer, and held that the special plea was a bar to the further prosecution of the defendant on the indictment for murder in the first degree, to which ruling the prosecuting attorney excepted. At the February term of court, 1871, the case came to trial again, and the jury found the defendant not guilty of murder in the second degree, but guilty of manslaughter. The defendant then moved the court to set aside this verdict, or so far as the same found the defendant guilty of manslaughter. The court sustained this

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motion and ordered the verdict to be set aside, and awarded the defendant a new trial. The prosecuting attorney excepted, and filed a petition in error in the Supreme Court for a ruling on the questions presented. The court held that the rule in criminal cases was the same as that in civil cases, and that is, that where a part of the issue has been found for the defendant, and he should obtain a new trial, that the whole issue would be reopened for investigation on the second trial.

The court say, at page 577:

"In the case now before us, if, after the granting of the new trial, the finding of the jury acquitting the defendant of murder in the first degree, stood as an adjudication of that fact, and had its full legal effect, it would preclude his retrial for any of the lower degrees of homicide.

"Thus, 'an acquittal on an indictment for murder will be a good plea to an indictment for manslaughter of the same person; and *e converso* an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for in the instance, had the defendant been guilty, not of murder but, of manslaughter, he would have been found guilty of the latter offense on that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder.' * * *

"But the effect of setting aside the verdict finding the defendant guilty, was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty, was of his innocence; and the burden was on the state to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the act was undetermined. This would be a verdict, to the effect, that if the defendant committed the homicide, he did it without 'deliberate and premeditated malice.'

"There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed; or rather, of which, under his plea, he is, in law, presumed to be innocent.

"The indictment was for a single homicide. The defendant could, therefore, only be guilty of one offense, and could be subject to only one punishment. The degrees of the offense differed only in the *quo animo* with which the act causing the homicide was committed. The question of fact was whether a criminal homicide had been committed, and, if so, whether the circumstances of aggravation were such as to raise it above the grade of manslaughter. If the finding as to the main fact

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is set aside, the finding as to the circumstances necessarily goes with it. * * *

"It seems to us, therefore, that the necessary result of granting the defendant's motion for a new trial, was to set aside the whole verdict; and this having been done at his own instance, it can neither operate as an acquittal, nor as a bar to the further prosecution of any part of the offense charged."

Fox v. State, 34 Ohio St. 377, is perhaps an extreme case. The defendant was indicted on a charge of rape; the jury found the defendant not guilty of rape as charged in the indictment, but guilty of an attempt to commit a rape, and the defendant was sentenced to a term of imprisonment in the penitentiary.

On a petition in error the Supreme Court held that an attempt to commit a rape was no crime in Ohio, and instead of discharging the defendant, in error, Fox, on the verdict of the jury of not guilty of rape, reversed the judgment of the common pleas court, and remanded the cause for a new trial. The language of the court is as follows, page 381:

"In our opinion, the verdict having failed to respond to the whole indictment in such manner as to authorize the court below either to sentence the accused or to order his discharge, it was the duty of the court, on its own motion, to set the verdict aside, and to order a new trial."

A case more nearly in point in its facts is *Jarvis v. State*, 19 Ohio St. 585. In that case, the first count charged homicide by throwing a glass tumbler against the head of the deceased; the second count, by striking the head of the deceased with a tumbler in the hand; and the third count, by striking the head with the hand. A trial resulted in a verdict of guilty as charged in the third count, and not guilty as charged in the first and second counts. The court sustained a motion to set aside the verdict, and Jarvis filed a plea in bar on the ground of the former acquittal on the first and second counts. A demurrer was sustained to this plea in bar, and the defendant was again placed on trial. The verdict of the jury at the second trial was guilty as charged in the first count, and not guilty as charged in the second and third counts. The court overruled a motion to set aside this verdict, and entered a judgment thereon. On a petition in error in the Supreme Court the judgment of the court of common pleas was affirmed on the authority of *Lesslie v. State*, 18 Ohio St. 390.

Lesslie v. State, *supra*, is one that appears to be directly in point. The facts are not fully stated in the report of the case, but from the statement given it seems to be more nearly like the case at bar in its facts than any other one cited.

At the December term, 1866, of the court of common pleas of Mont-

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gomery county, Joseph Lesslie was indicted on three counts, each charging him with murder in the first degree, in causing the death of Mary Miranda Caylor, by means of a pistol shot. He was put upon trial at the April term of that court, 1867. The jury's verdict was, "guilty of murder in the first degree, as charged in the first count of the indictment; and not guilty as charged in the second and third counts of the indictment." Lesslie moved the court to set aside this verdict and grant a new trial, on grounds therein stated. This motion was sustained by the court, and Lesslie again was put on trial, at the December term, 1868; that trial resulted in a verdict of guilty of manslaughter, as charged in the third count in the indictment, and not guilty as charged in the first and second counts.

Lesslie thereupon moved the court to release him from the charges contained in the indictment, and discharge him from custody, on the ground that on the first trial he was found guilty of murder in the first degree, as charged in the first count of the indictment, and not guilty as charged in the second and third counts, and that this verdict was set aside and a new trial granted; and that upon the second trial he was found not guilty upon the first and second counts in the indictment, but guilty of manslaughter upon the third count, and claimed that the verdict of guilty of manslaughter was irregular, illegal and void. This motion was overruled, and he was sentenced for a term of imprisonment in the penitentiary.

The court say, at the outset of the opinion, page 393:

"The three counts of the indictment, in this case, relate to the same person killed, and to one act of killing. They are all founded upon the same transaction, and are intended to meet the facts as they may be found from the evidence on the final trial. A conviction upon all or any one of the counts would have subjected the plaintiff in error to but one punishment. This is not a case of separate and distinct offenses set forth in different counts of the same indictment. The several counts are inserted solely for the purpose of meeting the evidence as it may appear on the trial, the crime charged being substantially the same in each count."

These words of the Supreme Court are equally as applicable to the case at bar. We cannot agree with counsel for the defendant that the counts of the indictment in this case charge separate and distinct offenses. They each charge murder in the first degree, and charge separate and distinct offenses only in the sense that murder in the first degree includes within it offenses of lesser atrocity.

The court say further, page 394:

"The ground of the motion for the discharge of the defendant below, after his conviction upon the third count, on the second trial, was that he had, on the first trial, been acquitted on the same count. The

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logical result of this position, as applied to this case would seem to be, that, on the new trial being granted, he was entitled to his discharge from the whole indictment; for the first and third counts were substantially alike, and were both in fact for the same offense, and if the verdict of acquittal on the third count remained in force and operated as a bar to a retrial upon that count, it would be equally effective against the further prosecution on the first count, and could be formally pleaded in bar as a former acquittal. A verdict of acquittal not only operates to discharge the defendant from the indictment on which he has been tried, but constitutes a bar to any other substantially like it for the same offense.

“Where the indictment, though consisting of several counts, is founded upon a single transaction, the verdict is a unit, and lays the foundation for but a single judgment. A verdict of guilty upon one of the counts, and of not guilty upon the others, is followed by the same legal consequences as a verdict of guilty upon all the counts; and when in either case, the verdict is set aside and a new trial granted on the defendant’s motion, the case is opened for retrial upon the counts upon which he was acquitted, as well as those upon which he was convicted. If this were not so, the value and object of the rule allowing a single offense to be charged in different ways in several counts would be greatly impaired, and often defeated.”

So, too, if the defendant in this case, by the former verdict, were freed of the charge of the murder of Katherine Hughes in the commission of rape, it would be an adjudication of the fact of the killing, and also of the fact that he is the person who committed that act; and those facts being adjudicated, he could not be placed upon trial upon the third count of this indictment. The argument of the Supreme Court in *Lesslie v. State. supra*, applies with force to the question in the case at bar.

We therefore hold that the setting aside of the verdict by the circuit court of Coshocton county, and the reversal of the judgment, placed the state and the defendant in the same position that they were in before the trial. In other words, that the verdict of the jury in that trial was an entire thing, and when reversed upon the application of the defendant himself, at his instance, he cannot now be heard to say that it must stand as an acquittal of the offense as charged in the first and second counts of the indictment.

The authorities cited by counsel of the defendant, many of them, are foreign to our state, and have but little weight as authority as against the decision of our own Supreme Court. *Sutcliffe v. State*, 18 Ohio 469 [51 Am. Dec. 459], is but a dictum, and is entitled to but little consideration.

In addition to the authorities cited, we might call the attention of

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counsel to the case of *Hurley v. State*, 2 Circ. Dec. 630 (4 R. 425), decided by the circuit court of Hamilton county. We call the attention of counsel particularly to the language of the court on page 631:

"The plea of the defendant that he was once in jeopardy, is not well founded, for the judgment for and against him, is set aside at his own instance, and he has no right to complain of that which he himself has brought about."

Our judgment is that the demurrer to the plea in bar should be sustained and the plea dismissed.

ESTOPPEL—INSURANCE.

[Hamilton Common Pleas, May 29, 1908.]

LAURA A. MARLING v. METROPOLITAN LIFE INS. CO.

1. WIFE FRAUDULENTLY TAKING OUT INSURANCE ON HER HUSBAND AND CONCEALING SUCH FACT FROM COMPANY ESTOPPED TO DENY CONSIDERATION FOR PREMIUMS PAID BY HER.

Where a wife takes out a policy of insurance on the life of her husband without his knowledge or consent, the existence of which he subsequently discovers, and in her dealings with the company conceals such fact after she knew or ought to have known that his consent was necessary, her fraudulent conduct in either event precludes her from asserting that the premiums paid by her, although with the subsequent acquiescences of her husband, were without consideration.

2. SUBSEQUENT FRAUDULENT CONDUCT IN CONCEALMENT PRECLUDES EQUALLY WITH ORIGINAL FRAUDULENT ACTS.

Estoppel which precludes a wife, taking out a policy on the life of her husband, from the benefit of a want of a consideration when the fraudulent conduct is concomitant with the issuance of the policy, is equally applicable when the fraudulent conduct is subsequent to its issuance but during the nominal life of the policy.

[Syllabus approved by the court.]

Dudley P. Wayne and W. A. Hicks, for plaintiff.

Robertson & Buchwalter, for defendant.

HUNT, J.

The plaintiff, Laura A. Marling, and her husband, John B. Marling, are both more than ordinarily intelligent and familiar with business methods, in other words, with contracts, their obligations and limitations, for business is essentially a life of contract in which the performance and expected performance of contracts under anticipated conditions are always in mind. John B. Marling was the cashier of the Hall Safe & Lock Company for many years until his retirement from business; and his wife, having inherited property interests of her own to care for, was an occasional visitor at the races, a small shareholder in a neighboring race track association, and was at least an occasional par-

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ticipant in the hazards of such business, consorting with friends of that fraternity. She gradually began to live apart from her husband for reasons not disclosed in the evidence, except as may be inferred from the manifest disparity of ages and tastes.

She contributed to her finances by the use of her knowledge of stenography, and after business trips to New York, established and successfully managed a rooming house in that city, doing all these things with the apparent acquiescence of her husband, who by his constant attendance at each day of the trial of this case, even to the postponed day of argument, and by his testimony manifested his interest in her success in this case.

On July 25, 1890, Laura A. Marling signed an application to the Metropolitan Life Insurance Company for a \$500 insurance policy on the life of her husband, John B. Marling. The blanks in the body of the application are filled up in the handwriting of the agent, John McMullen. On the other side of the application blank is a blank for the physician's certificate. This is filled up in the handwriting of the physician, and immediately to the left of the physician's certificate is what purports to be the signature of the insured, John B. Marling.

In the application, the applicant warrants the truth of the answers and representations made in the application and in the medical examination as all being true.

Plaintiff testifies that she did not write the signature of John B. Marling and does not know who did. John B. Marling says he did not write it, that he was not examined, and that until some years after the date of the application he knew nothing whatever about the matter. The agent who took the application has been dead for many years; and the examining physician was not called as a witness as it was stated that he had no recollection whatever of the subject. The plaintiff says that at the time of the application she was assured by the agent that her husband's consent was not necessary.

The signature of John B. Marling by comparison with the handwriting of the agent and of the examining physician, and of Laura A. Marling, and of the signature of John B. Marling to a deposition taken in this case, differs radically from the handwriting of the agent and the examining physician, and is wonderfully similar not only to the handwriting of Laura A. Marling, but to that of John B. Marling himself, so that as far as similarity of handwriting can be judged by a non-expert, the signature of John B. Marling at the foot of the medical examination might be either that of John B. Marling or of the plaintiff, his wife.

The fact that if John B. Marling did not sign the medical examination the plaintiff may have done so, is made probable by the fact that in 1892 she admits that she insured her mother's life in the same com-

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pany and on the same plan, without her mother's knowledge and signed her mother's name to the application, knowing it to be necessary, and in 1899 when she did not care any longer to carry such insurance, she negotiated with the company for a settlement, and testifies that she may have signed her mother's name to the blank necessary to be signed in making such settlement.

At the time of the delivery of the policy to the plaintiff there was also delivered to her a premium receipt book succeeded by other similar books filled with premium receipts. Although the plaintiff has produced only the last two of the books, from the evidence it is disclosed that all of such books contained the printed rule as to the insured's consent being necessary to the validity of the policy.

The plaintiff says that although she may have read such rule, she paid no attention to it until about 1895 when, upon receiving a new book, she called the collecting agent's attention to it and was assured that it did not apply to her policy. Upon this statement she says that she relied and made no further investigations, but continued the payment of her premiums.

The plaintiff claims that for many years she managed to keep the existence of this policy from the knowledge of her husband, supposing that this knowledge and consent thereto was unnecessary, and for the further reason that her husband was opposed to life insurance, although the evidence shows that in 1891 her husband at her solicitation took out a policy in a Hartford insurance company, and kept it up for several years, and further in 1897 and 1898, when he discovered the premium receipt book, he made no such objections, nor took any such action as would preclude a finding of his full acquiescence in the continued carrying of the policy, nor were his feelings toward his wife at that time such that if that was the first knowledge he had of the policy and book, he would not, with his knowledge of business, have examined the book, as in *Metropolitan Ins. Co. v. Felix*, 73 Ohio St. 46 [75 N. E. Rep. 941], sufficiently to have advised his wife of the invalidity of the policy.

If this natural act, under the circumstances, had been done, and suit had been brought for the premiums paid, and if full credence were given to the testimony of the plaintiff and her husband, the case would have been almost identical with *Metropolitan Ins. Co. v. Felix*, *supra*, except as plaintiff's own conduct and knowledge might have differentiated it.

Marling may not have been able to advise his wife that she could have recovered all of the premiums paid, but with his business experience he would have advised her that it was useless to pay further premiums.

Plaintiff, without any objections on the part of her husband, continued to pay the premiums for several years more, until in 1903, her husband then being an old man, but in good health, she entered into correspondence with the company and into negotiations with the local

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agents in regard to cashing the policy. These negotiations occupied some time, and although during such negotiations she carried the policy and book back and forth in going to and from her place of business, she still claims that she did not appreciate the force of the rule as to the necessity of her husband's consent to the original issuance of the policy.

During that time she claims she lost the policy and the first premium books.

When the time arrived at which the company said a settlement could be made, in 1905, she was given a blank to be signed by her husband, similar to the blank to which she says she may have signed her mother's name, when a settlement was obtained on her mother's policy, and was told that this blank must be signed by her husband before the settlement could be made.

During these negotiations nothing was ever said by her to the company or its agents in regard to the policy having been issued without her husband's consent and continued against his wishes, although if the plaintiff thought that such original consent was not necessary to the validity of the policy, it would have been natural for her, when told to get her husband's consent to the settlement, to say that she did not know what he had to do with the settlement; especially as at that time she claims to have been living apart from her husband. Possibly if the settlement had been otherwise satisfactory she would not have hesitated to have signed her husband's name, as she admits she may have done in the settlement of her mother's policy.

She did not make any settlement of the policy, the terms offered not being satisfactory, but continued to pay premiums until on November 1, 1905, she read in the daily papers a report of the decision of the Supreme Court in *Metropolitan Ins. Co. v. Felix, supra*. Then for the first time she claims she not only learned that the policy was, and had always been, void by reason of the want of her husband's consent to its issue, but also that if she could prove that fact she could recover all the premiums paid and interest.

With business-like energy and confidence in her own abilities to take care of her own interests, not only with the company but with the attorneys, she proceeded to avail herself of the information, and entered into negotiations with the company. After she called their attention to the fact that she relied upon *Metropolitan Ins. Co. v. Felix, supra*, she unwittingly wrote her husband's name and her own on a piece of paper, and when her attention was called to the similarity of the handwriting on such paper to both her signature and her husband's signature on the application, she attempted to destroy such paper, going for that purpose to the office of the company's attorney with whom she had previous interviews in regard to a settlement. The fact that the attorney of the

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company permitted Mrs. Marling to disclose her case as a prospective client without informing her of his relations with the company, in some respect excuses her conduct toward him, but nevertheless her attempt to destroy a paper in his possession, after she knew that he was the company's attorney, is in accordance with her prior conduct.

Without regard, therefore, to how far the acquiescence of the husband in the payment by the plaintiff of premiums for years after the alleged discovery by him of the existence of the policy might cure the want of consent to the original issuance of the policy—if there was such want of consent—there seems to have been fraudulent conduct on the part of the plaintiff in signing her husband's name to the application, or if she did not sign his name, and if she originally supposed that such consent was not necessary, in the concealment of such want of consent in her own subsequent dealing with the company, after she must have known that such consent was necessary.

The present case differs radically therefore, from the case of *Metropolitan Ins. Co. v. Felix*, *supra*; but the doctrine of Lord Mansfield, quoted on page 53 of that case, *i. e.*, "There being no fraudulent conduct by the beneficiary, to constitute a consideration for the payment of premiums there must be a contract against which at the time of its execution, the insurer cannot interpose a valid defense," in its very first clause precludes the plaintiff in this case from now claiming that the premiums paid by her were without consideration.

The petition of the plaintiff will therefore be dismissed.

DECISION ON MOTION TO SET ASIDE JUDGMENT AND FOR A REHEARING.

It is urged in this case that if the judgment is founded in any way upon a finding that Mrs. Marling signed her husband's name that such fact must be established beyond a reasonable doubt and not by the mere preponderance of the testimony. *Lexington Fire, L. & M. Ins. Co. v. Paver*, 16 Ohio 324 and *Strader v. Mullane*, 17 Ohio St. 624, are cited as supporting the proposition. A later case, *Bell v. McGinness*, 40 Ohio St. 204 [48 Am. Rep. 673], is inconsistent with such rule.

It is further urged that if the plaintiff was not guilty of any fraudulent conduct at the time of the issuance of the policy, any subsequent fraudulent conduct would not bring the case within the quotation from Lord Mansfield in *Metropolitan Ins. Co. v. Felix*, 73 Ohio St. 46 [75 N. E. Rep. 941]. The same reason, *i. e.*, estoppel which precludes the plaintiff from the benefit of a want of consideration when the fraudulent conduct is concomitant with the issuance of the policy, is equally applicable when the fraudulent conduct is subsequent to such issuance but during the nominal life of the policy, and the original decision in this case, if necessary, should be modified to so state.

The motions will therefore be overruled.

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BENEFICIAL ASSOCIATIONS—INSURANCE.

[Hamilton Common Pleas, April Term, 1908.]

EUGENE DALEY V. BROTHERHOOD OF RAILWAY TRAINMEN.**DECLARATIONS OF ASSURED AS TO HIS HEALTH MADE PRIOR OR SUBSEQUENT TO HIS APPLICATION HELD INADMISSIBLE.**

Mutual beneficiary associations are not excepted from the rule excluding declarations or admissions as to the health of insured made prior or subsequent to his application for insurance, and not part of the *res gestae*, as evidence of falsity of statements in assured's application; such statements can only be admitted in connection with other substantive evidence showing falsity of statements therein and as evidence of knowledge thereof by assured near the time of making the application.

[Syllabus approved by the court.]

MOTION for new trial.

The defendant is a fraternal beneficiary association under the laws of Ohio.

In March, 1904, James Daley was admitted to membership and about March 28, the defendant issued and James Daley accepted a beneficiary or insurance certificate by which at his death in accordance with and subject to the conditions set forth in the certificate and the constitution and bylaws of the association there was to be paid to the plaintiff Eugene Daley the sum of \$1,350.

This certificate was issued after and as the result of a written application theretofore made March 20, 1904, by James Daley. In this application James Daley made certain statements in the form of answers to certain questions printed on the application blank. James Daley died April 28, 1904, and this suit is brought by Eugene Daley upon the insurance certificate.

The defendant says that some of the statements of James Daley in his application were false and in its answer sets up specifically in what respect such statements are claimed to be false and further says that such insurance certificate would not have been issued except by reason of defendant's reliance on the truth of such statements as made.

During the trial the defendants offered evidence of oral statements or declarations of James Daley, before and after the issuance of the insurance certificate, as to his physical condition, at and before the time such oral statements were made. Such declarations were not offered as expressions of physical condition, but as declarations in the nature of admissions. Objections to such evidence were sustained. The jury brought in a verdict for the plaintiff and the defendant filed a motion to set aside this verdict and for a new trial.

William Littleford and H. G. Frost, for plaintiff.

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Cited and commented upon the following authorities: *McNutt v. Kaufman*, 26 Ohio St. 127; *Metropolitan Life Ins. Co. v. Howle*, 62 Ohio St. 204 [56 N. E. Rep. 908]; *Klunk v. Railway*, 74 Ohio St. 125 [77 N. E. Rep. 752]; *Judge v. Benefit Assn.* 30 O. C. C. 133; *Despatch Line v. Glenn*, 41 Ohio St. 166; *Thompson*, Trial Ev. Sec. 357; *Andrews v. Watson*, 12 Circ. Dec. 686; *Foxhever v. Order of Red Cross*, 24 O. C. C. 56; *Tafel v. Supreme Commandery K. of G. R.* 9 Dec. Re. 88 (12 Bull. 35); *Thesing v. Supreme Lodge K. of A.* 11 Dec. Re. 88 (24 Bull. 401); *Ohio Ins. Law* 234; *Fraternal Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 293; *Swift v. Insurance Co.* 63 N. Y. 186 [20 Am. Rep. 522]; *Schufflin v. State*, 20 Ohio St. 233; *Thurman v. State*, 2 Circ. Dec. 466 (4 R. 141); *Hunter v. Fraternal Alliance*, 7 Dec. 239 (5 N. P. 35); *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452 [59 Am. Dec. 684]; *Aetna Life Ins. Co. v. France*, 91 U. S. 510 [23 L. Ed. 401]; *Jeffries v. Insurance Co.* 89 U. S. (22 Wall.) 47 [22 L. Ed. 833]; *Hartman v. Insurance Co.* 21 Pa. St. 466; *Byers v. Insurance Co.* 35 Ohio St. 606 [35 Am. Rep. 623]; *Cochran v. Almack*, 39 Ohio St. 314; *First Nat. Bank v. Cornell*, 41 Ohio St. 401; *Sternberger v. Hanna*, 42 Ohio St. 309; *Roberts v. Briscoe*, 44 Ohio St. 600 [10 N. E. Rep. 61]; *Bomberger v. Turner*, 13 Ohio St. 263 [82 Am. Dec. 438]; *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio St. 614 [68 N. E. Rep. 4]; *Connecticut Mut. L. Ins. Co. v. Pyle*, 44 Ohio St. 19 [11 N. E. Rep. 465; 58 Am. Rep. 781]; *Grand Lodge A. O. U. W. v. Bunkers*, 13-23 O. C. C. 487; *Bacon, Ben. Soc. Secs.* 211, 212; *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183 [7 Sup. Ct. Rep. 500; 30 L. Ed. 644]; *Campbell v. Insurance Co.* 98 Mass. 381.

HUNT, J.

The findings of the jury as to the facts necessary for them to find in arriving at their verdict will not be disturbed.

All the points of law raised upon the hearing on motion for new trial were urged in the same form during the trial except one, that is as to the refusal to admit evidence of the declarations or admissions of the deceased in regard to his health.

During the trial the competency of these declarations was claimed generally and denied by the court in accordance with the general rule laid down in *Fraternal Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 292; *Union Cent. Life Ins. Co. v. Cheever*, 36 Ohio St. 201 [38 Am. Rep. 573]; and *Union Cent. Life Ins. Co. v. Buzer*, 62 Ohio St. 385, 400, to wit: that the declarations of the deceased made prior or subsequent to the application and not part of the *res gestae* of an act as to which evidence was admissible nor tending to show that the statements in the application were to the knowledge of the applicant untrue are not competent in an action brought by a beneficiary upon a policy of in-

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insurance. The first case referred to applies to subsequent declarations and the second to prior declarations.

During the trial no claim was made that the rule was any different as applied to ordinary life insurance companies than to mutual beneficiary associations but upon the motion for a new trial while it is admitted that the general rule is applicable to the former its application is denied as to the latter. The case of *Foxhever v. Order of Red Cross*, 24 O. C. C. 56, is cited in support of such distinction and exception to the general rule. The real question in that case as stated on page 60 is whether or not the deceased was a member of the order at the time of his death, that is, whether he had been properly expelled from the order during his lifetime and if not whether he had not acquiesced in an informal expulsion and had thereby ceased to be a member. The case was decided on the authority of *Dimmer v. Supreme Council C. K. of A.* 12 Circ. Dec. 413 (22 R. 366), wherein it was held that a three years' acquiescence in a void expulsion terminated deceased's membership in the order and voided the insurance certificate.

In *Foxhever v. Order of Red Cross*, *supra*, the declarations were explanations of the deceased's conduct in acquiescing in his expulsion and were competent as part of the *res gestae* of such acquiescence which was a relevant fact. The recognition of the distinction and exception now claimed was only incidental, the court citing Niblack and Bacon in support thereof.

Niblack, Ben. Soc. Sec. 325, and Bacon, Ben. Soc. Sec. 460 recognizes such distinction but the cases cited by them and by 7 Am. & Eng. Enc. Ev. 535, with few exceptions although authority for the admission of such declarations under certain circumstances are not authority for the general distinction attempted to be made by Niblack and Bacon.

An examination of the cases cited by these authorities and of other cases upon the same subject shows that the statements of such authorities are rather the expressions of what they think the law ought to be than what it is and the reasons given by them for such statements, to wit: that the insured could at any time change the beneficiary of the policy is only to a greater degree applicable to mutual beneficiary certificates than it is to ordinary policies of insurance in which the right of the insured to change the beneficiary is frequently reserved.

It seems to me that such authors and the few cases which refer to or support the distinction made by them failed to recognize, or at least failed to give full effect to the fact, that the validity of mutual beneficiary certificates depends on the insured's being a member of the order or society at the time of his death and fails to recognize that in many of the suits upon such certificates the issue is not as to the truth or falsity of the statements in the application but whether or not the insured was a member in good standing at the time of his death

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or whether or not such question of membership had not already been tried by the order itself and acted upon formally or informally in such a manner or with such acquiescence on the part of the member as to have precluded the member during his lifetime from claiming otherwise.

The case of *Hansen v. Supreme Lodge K. of H.* 140 Ill. 301 [29 N. E. Rep. 1121], referred to by Niblack is such a case. There is no question that a member of a beneficiary order can at any time terminate his membership and can make admissions or declarations and waivers of rights upon which the society can act in terminating his membership and that even if such membership is terminated informally by the society the member can, by his conduct, be estopped from claiming that he is a member, and if the validity of the insurance certificate depends upon the insured being a member at the time of his death any termination of membership will terminate all rights under the insurance certificate.

Necessarily admissions or declarations of the member upon such an issue might be competent when they would not be competent where there was no claim of any termination of membership formally or informally and where the issue as to the contractual liability upon the insurance certificate is in no respects different than the ordinary issues upon ordinary life insurance policies.

In the case of *Supreme Lodge K. of P. v. Schmidt*, 98 Ind. 374, although the declarations were rejected under the general rule and as not part of the *res gestae* of a relevant fact, they might also have been rejected because they were in no way connected with the termination of the deceased's membership, which was the real issue in the case.

The case of *Stewart v. Supreme Council A. L. of H.* 36 Mo. App. 319, was another case in which the issue was as to the membership and the declarations of the deceased were admitted as part of defendant's waiver of personal notice of suspension and abandonment of membership.

In other cases without regard to whether they were suits upon ordinary life insurance policies or mutual beneficiary certificates, such declarations were admitted only in connection with other substantive evidence showing falsity of statements in the application and as evidence of knowledge by the insured of such falsity when the statements in the application were made. Even then such declarations were required to have been made sufficiently near to the time of the application to charge the applicant with knowledge of such falsity at such time.

Such cases were the *Supreme Conclave K. of D. v. O'Connell*, 107 Ga. 97 [32 S. E. Rep. 946], where a distinction was made as to declarations before and after the application; *Rawson v. Insurance Co.* 115 Wis. 641 [92 N. W. Rep. 378]; *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146 [26 S. E. Rep. 421; 36 L. R. A. 271; 64 Am. St. Rep. 715]; *McGowan*

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v. *Supreme Court I. O. F.* 104 Wis. 173 [80 N. W. Rep. 603]. In neither of the last two cases was any point made of the character of the company or society or of the right of the insured to change the beneficiary. *Swift v. Insurance Co.* 63 N. Y. 186 [20 Am. Rep. 522]; *Thomas v. Grand Lodge A. O. of U. W.* 12 Wash. 500 [41 Pac. Rep. 882]; *Co-operative Assn. v. Leflore*, 53 Miss. 1.

In some cases such declarations were admitted only as part of the *res gestae* of some act relevant in itself. Such cases were *Smith v. Benefit Soc.* 123 N. Y. 85 [25 N. E. Rep. 197; 9 L. R. A. 616], in which the declarations were held to be part of a scheme to defraud; *Van Frank v. Benefit Assn.* 158 Ill. 560 [41 N. E. Rep. 1005].

All such cases, although the declarations were held to be competent, are no authority for excepting mutual beneficiary societies from the application of the general rule as to the exclusion of the declarations of deceased in suits upon the contract of insurance.

The cases of *Fidelity Mut. Life Assn. v. Winn*, 96 Tenn. 224 [33 S. W. Rep. 1045], where the declarations were offered by the beneficiary himself; *Nix v. Donovan*, 46 N. Y. 21 [18 N. Y. Supp. 435], where the question was only as between beneficiaries; and *Cohen v. Insurance Co.* 41 N. Y. Super. Ct. (9 Jones & S.) 296, where the insured and the beneficiary jointly applied for the insurance, are inapplicable to the question now under consideration.

Niblack cites *Smith v. Benefit Soc.* 51 Hun 575 [4 N. Y. Supp. 521], but on error the upper court, *Smith v. Benefit Soc. supra*, sustains the competency of the declarations only as part of the *res gestae* of a relevant fact. *Steinhausen v. Accident Assn.* 36 N. Y. 70 [13 N. Y. Supp. 36], may be considered as in accordance with that distinction made by Niblack, and *Callies v. Modern Woodmen of Am.* 98 Mo. App. 521 [72 S. W. Rep. 713], cites and follows Niblack in the admissions of the declarations of deceased as to having had hemorrhages.

1 Enc. Pl. & Pr. 573, states that declarations from deceased are admissible when insured had right to change beneficiary, but cases cited do not support such statement, except *Steinhausen v. Accident Assn. supra*.

The court has not before it a transcript of the testimony given in this case and from its own notes and memory the declarations offered in this case seem to have been offered only as evidence of the falsity of statements made in the application by the insured for insurance and as so offered they would be incompetent under the general rule and not within the distinctions made in the cases above referred to. The rulings of the court made at the time of trial will therefore be adhered to and the motion for new trial will be overruled.

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MASTER AND SERVANT.

[Lorain Common Pleas, June 5, 1907.]

DAVID G. MCGILL V. CLEVELAND & SOUTH WESTERN TRAC. CO.

1. PROMISE TO SUPPLY NEW INSTRUMENTALITY EQUIVALENT TO PROMISE TO REMEDY DEFECT.

A promise of the master to supply a new instrumentality in place of one from which the servant apprehends danger has the same effect in law as a promise to repair a defect in an existing instrumentality, the use of which is to be continued.

2. PROMISE TO SUPPLY NEW STEPLADDER FOR DEFECTIVE ONE IN USE DOES NOT SHIFT RISK FROM SERVANT TO MASTER.

A servant assumes the risk of injury from such simple portable appliances as stepladders, the plain and obvious defects of which and anticipated dangers whereof reasonably to be anticipated and ordinarily resulting therefrom, he is presumed to know and understand as well as the master; accordingly a promise by the master to repair or replace such defective tools or appliances, as distinguished from intricate machinery the use of which requires the exercise of great skill and care, does not shift the assumption of risk from servant to master.

[Syllabus approved by the court.]

DEMURRER.

Skiles, Green & Skiles and L. Stroup and L. B. Fauver, for plaintiff.

E. G. & H. C. Johnson, for defendant.

WASHBURN, J.

This case has been submitted to the court upon demurrer to the petition. The petition alleges in substance that the plaintiff was working for the defendant and that it was his duty, among other things, to wash the windows of the cars of the defendant, and that the defendant furnished him with a stepladder for that purpose. And then he avers that,

"Some days prior to the twenty-third day of October, 1906, plaintiff discovered that said ladder which the defendant had furnished to

*Decision of the Lorain circuit court, on error, September 27, 1907.

HENRY, J.

The judgment below is sustained by the overwhelming weight of authority.

One Kentucky case alone supports the contrary view of the law of Labatt, Mas. & Serv. Though not unimpressed by that writer's doubts concerning the soundness of the general rule, we follow the authorities in holding that ordinarily an employe is conclusively presumed to know the manifest defects of the hand tools and other simple, portable appliances which he handles in using, and because he can accurately estimate and easily avoid or remedy the danger therefrom, a promise by the employer to repair or replace such objects cannot ordinarily be deemed to imply that the assumption of risk from defects complained of has shifted from the employe to the employer. A common stepladder is within this rule. The judgment below is affirmed.

Marvin and Winch, JJ., concur

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him to use while performing his duties as aforesaid had become old, worn and defective to such an extent that the same was unfit for plaintiff to use in connection with his said work in that the steps of the stepladder were loose and worn and the iron braces holding said steps to the side posts of said ladder were loose, broken and defective."

Then follows an allegation that soon after discovering the condition of said stepladder the plaintiff complained to his foreman "of the defective and dangerous condition of said ladder" and that said foreman promised to replace said ladder with a new and proper one.

There is a further allegation that along about the same time, the plaintiff complained to the master mechanic of the defendant company "of the defective and dangerous condition of said ladder" and that the master mechanic promised and assured plaintiff that he would be furnished with a new, sufficient and proper ladder with which to perform his work as soon as the same could be made; that he should use said ladder until a new ladder was furnished. There is also an allegation that the plaintiff relied upon the defendant's fulfilling its said promise and that he continued to perform his labor as directed by his foreman; that his foreman directed him to clean the windows on the outside of the vestibule of one of the defendant's cars, and that in order to do so, it was necessary for him to use said ladder, and that while attempting to use said ladder "the steps of said ladder and braces thereof gave way by reason of its old, defective and dangerous condition," and plaintiff was thrown upon and across the bumper of said car and injured.

The negligence complained of is the carelessness of the defendant in permitting and allowing said ladder to be and remain in said defective, worn-out and dangerous condition and in not furnishing plaintiff with a new, proper and sufficient ladder in accordance with said promise.

As I have said, a demurrer has been filed to this petition on the ground that it does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

In argument, the question is raised, whether or not a promise of the master to supply a new instrumentality is the same in law as the promise of the master to repair a defect in an existing instrumentality. On that proposition I quote with approval what is said by 1 Labatt, Mas. & Serv. 419:

"There is apparently no adequate ground upon which it can be maintained that a promise to furnish other instrumentalities in place of those from which the servant apprehends danger should not be deemed equivalent in its legal effect to a promise to remedy a defect in some instrumentality the use of which is to be continued. Such equivalence has been asserted or taken for granted in several cases."

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Although there are intimations in some of the cases which would put promises of these two descriptions upon different footings, I have found no well-considered case which so decides; and in view of the large number of cases where the promise in reference to a new instrumentality has been taken to be the same as a promise to repair an instrumentality in use, and in view of the fact that I can see no good reason for a distinction, I hold that the petition states a cause of action so far as that is concerned.

The next question raised by this demurrer is whether or not the rule that a servant is entitled to go on working for a reasonable time after a promise to remove a danger, without his being charged with an assumption of the risk, is applicable to a case where the injury is caused by a simple appliance the defects of which are understood as fully by the servant as by the employer. So far as I know, this question has not been determined by any court in Ohio.

Under the facts shown by the petition in this case it is plain that the plaintiff would not be entitled to recover except upon the theory that the promise of the defendant to substitute a new ladder relieved him from the assumption of risk which would follow from his intimate knowledge of the condition of the ladder. The plaintiff alleges that he ascertained that the ladder was defective and dangerous, and was "unfit for plaintiff to use in connection with his said work." It follows, then, that but for the promise which it is claimed the defendant made, he could not recover for an injury resulting from the use of a stepladder which he knew was in such a defective and dangerous condition.

It is significant that the plaintiff was so impressed with the dangerous condition of the stepladder that he complained of it not only to his immediate boss but to the master mechanic of the defendant, and that the boss and the master mechanic both regarded the stepladder as beyond repair, and the plaintiff claims that each of them promised to supply a new ladder. The plaintiff appreciated that the using of the old stepladder was dangerous, because he says in his petition that he discovered that it was dangerous and so reported it two different times.

It is beyond question that if the plaintiff with his knowledge of the defective condition of the stepladder and his appreciation of the danger in using the same, had continued to use it without any promise on the part of the company to replace it with a new ladder, he could not recover. It is also true that if the promise alleged in this case brings the case within the general rule on the subject, he is relieved by such promise from the consequences of his knowledge of the defective condition of the stepladder. The general rule is stated as follows by Cooley, Torts 661:

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"If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume its risks."

The courts of Kentucky and Kansas hold that this rule applies to simple appliances where the servant is employed in the performance of ordinary labor, while the courts of several other states have determined that the rule does not apply where the servant is employed in the performance of ordinary labor in which no machinery is used, the use of which requires the exercise of great skill and care, where the defects of the appliance used are understood and appreciated as fully by the servant as by the employer. Perhaps the leading case on this subject is *Marsh v. Chickering*, 101 N. Y. 396. That happens to be a stepladder case and is quoted with approval in 1 Bailey, *Master's Liability for Injuries to Servant*, p. 181, Sec. 525; p. 1053, Sec. 3105, where it is laid down that defects in a ladder used by the employes were not within the general rule and that the promise to repair such implements, and those of like character and purpose, did not affect the master. I will not quote at length from this case, because counsel may be familiar with it, and if not, they will, of course, desire to read the whole case. In a case in the supreme court of Arkansas, where there was a defective ladder, which defect had been reported and the employer had promised to supply a better ladder, it was held in an action against an employer for damages that the plaintiff could not recover, he having assumed the risk. *St. Louis, A. & T. Ry. v. Kelton*, 55 Ark. 483 [18 S. W. Rep. 933].

The same doctrine is held by the supreme court of Indiana where, in a case decided in 1894, it is said in the syllabus:

"A master is not liable to a servant of mature years, and ordinary mental capacity, who is injured, in his employ by reason of a defect in a ladder, of which he was aware, though the servant had notified the master of such defect and was told to use the ladder until another was furnished." *Meador v. Railway*, 138 Ind. 290 [37 N. E. Rep. 721]. See, also, *Crum v. Pump & Lumber Co.* 34 Ind. App. 253 [72 N. E. Rep. 193].

That doctrine is approved in *Gowen v. Harley*, 56 Fed. Rep. 973. In a case decided by the supreme court of Maine and reported in *Conley v. Exposition Co.* 87 Me. 352 [32 Atl. Rep. 965], it was held under similar circumstances that the servant could not recover.

From what appears in the digest it seems that the Illinois court of appeals has recently had this subject before it for determination in three cases, and it is there held that the general rule hereinbefore quoted does not apply to injuries caused by a simple appliance. *McCormick Harv.*

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Mach. Co. v. Wojciechowski, 111 Ill. App. 641; *Bowen v. Railway*, 117 Ill. App. 9; *International Packing Co. v. Krelowicz*, 119 Ill. App. 448.

In a recent case decided by the supreme court of Illinois, *Gunning System v. Lapointe*, 72 N. E. Rep. 393, 395 [212 Ill. 274], the following language is used:

"While, as a broad, general proposition, the master is required to furnish the servant a reasonably safe place in which to work, it is also true that if the defect is so open and obvious that the servant does see and know of the existence of the defect, and the danger arising therefrom is apparent and known to him, or within the observation of a reasonably prudent man in his situation, and the servant enters upon and continues the work, he is held to assume the risks and hazards of the employment due to such conditions. The servant may, however, in some cases, suspend the operation or force of the rule of assumed risk as to such defects and dangers by complaining to or informing the master thereof and obtaining from him the promise to repair the defects and obviate the danger. It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended, and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master."

There is another case decided by the supreme court of Illinois where the same doctrine is laid down, *Webster Mfg. Co. v. Nesbitt*, 205 Ill. 275 [68 N. E. Rep. 936]. In this case a blacksmith was furnished by his master with a hammer that had become chipped and he was injured owing to its defective condition after a promise to repair had been made by the master; and it was held that the tool being merely a common hammer of which the servant had as complete knowledge as the master, the servant would be deemed to have assumed the risk. And after stating the general rule to the effect that a promise of the master to repair a defect in an appliance used by the servant relieves the servant from the charge of negligence by continuing in the service, the opinion proceeds as follows:

"But the rule which exempts an employe from assuming the risk where a promise to repair is made is designed for the benefit of those engaged in work where machinery and materials are used of which the employe has little knowledge, but it does not apply to ordinary labor

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which only requires the use of implements with which the employe is entirely familiar."

In a case decided by the supreme court of Wisconsin, *Cocoran v. Gas Light Co.* 81 Wis. 191 [51 N. W. Rep. 328], it was decided that a petition did not state a good cause of action for personal injuries where the plaintiff alleged that he was employed by the defendant and occasionally required to use a ladder, and that on complaining that the ladder furnished was not safe he was told that a suitable one would be provided for future work, and relying on such promise he continued in the employment and that a suitable ladder was not provided, and that thereafter, while, by the foreman's order, he was ascending a ladder which was unprovided with spikes at its end or with other safe appliance, and resting upon an oily floor, it slipped and occasioned the injury complained of.

From a reading of these cases it is apparent that the courts have many times decided that the mere promise of the master to supply a new ladder will not justify a servant in using an old ladder which he knows to be defective and dangerous; and while there are other cases where other appliances than ladders are involved which hold a different rule than that indicated by the cases I have stated, still I am of the opinion that the great weight of authority is to the effect that the plaintiff in this case is not, under the facts alleged in his petition, entitled to recover, for the reason that he is conclusively presumed to know the plain and obvious defects of such simple portable appliances as he handles in the daily prosecution of his work. As to such defective tools and appliances he is in a position where he can readily discover and easily avoid or remedy the danger reasonably to be anticipated and ordinarily resulting from their use. In such case the promise of the employer to repair or replace such defective tools or appliances does not shift the assumption of risk in their use from the employe to the employer.

I am not unmindful of the decision of our supreme court, *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148 [48 Am. Rep. 669]. That was a case which under all the authorities comes within the general rule which permits a servant to continue in the employment of the master with knowledge of defects in a machine of which he has complained and received assurances that the same would be remedied without being charged with assumption of the risk. The injury in that case was caused by a machine and not by a simple appliance like a ladder.

If the case at bar comes within the general rule, then, of course, the law as laid down in the above case is applicable, but, as I have heretofore stated, it is my judgment that the case at bar does not come within said general rule and for that reason the promise of the master to supply a new stepladder does not change or enlarge the liability of the master.

The demurrer will, therefore, be sustained.

Avery v. Howard.

WILLS.

[Hamilton Common Pleas, April, 1908.]

C. HAMMOND AVERY, ADMR., ETC. v. CHARLES F. HOWARD, ET AL.

1. ORDER OF COURT TO SELL REAL ESTATE BY TESTAMENTARY TRUSTEE HELD UNNECESSARY.

The executor and testamentary trustee under a will having died, his administrator with the will annexed, under Sec. 5986 Rev. Stat. in executing the provisions of the will, has authority to sell, without order of court, testatrix's real estate in fee.

2. SHARES OF DECEASED DEVISEES IN PROCEEDS OF REALTY SOLD UNDER TERMS OF WILL DESCEND AS PERSONALTY.

Upon the death, before distribution, of one or more of several named devisees, to each of whom a share of the proceeds of certain real estate of testatrix is to be distributed "equally, share and share alike," the bequest descends to the heirs of such deceased devisees as personalty and is payable to their personal representatives.

3. CUSTODIAN OF EARLIER WILL WITHHOLDING IT FROM PROBATE MORE THAN THREE YEARS UNTIL LATER WILL SET ASIDE NOT DEBARRED AS DEVISEE.

A custodian of the last will of testatrix, having probated it within thirty days and after a lapse of more than three years, upon setting it aside, secured the probate of an earlier will, also left in his possession, is not debarred under Sec. 5943 Rev. Stat. from taking as a devisee under the former will because of withholding it from probate for more than three years.

C. H. Avery, for plaintiff:

Cited and commented upon the following authorities: *Sowers v. Cyrenius*, 39 Ohio St. 29 [48 Am. Rep. 418]; *Elstner v. Fife*, 32 Ohio St. 358; *Collier v. Grimesey*, 36 Ohio St. 17; *Richey v. Johnson*, 30 Ohio St. 288; *Collier v. Collier*, 3 Ohio St. 369; *McGuffey v. Brooke*, 13 Dec. Re. 873 (2 C. S. C. 231); *Horst v. Dague*, 34 Ohio St. 371; *Brown v. Burdick*, 25 Ohio St. 260; *Runyan v. Price*, 15 Ohio St. 1 [86 Am. Dec. 459]; *Ousley v. Witheron*, 7 Circ. Dec. 448 (13 R. 298); *Evans v. Anderson*, 15 Ohio St. 324; *Haynes v. Haynes*, 33 Ohio St. 598 [31 Am. Rep. 579]; *Carpenter v. Denoon*, 29 Ohio St. 379; *Hill v. Phillips*, 14 R. I. 93; *Hanger v. Abbott*, 73 U. S. (6 Wall.) 532 [18 L. Ed. 939]; *Braun v. Sauerwein*, 77 U. S. (10 Wall.) 218 [19 L. Ed. 895].

H. R. Weber and D. J. Starr, for defendants:

Cited and commented upon the following authorities: *Morrow v. Barker*, 119 Cal. 65 [51 Pac. Rep. 12]; *Bank of Alabama v. Dalton*, 50 U. S. (9 How.) 522 [13 L. Ed. 242]; *Rowell v. Patterson*, 76 Me. 196; *Erwin v. Turner*, 6 Ark. 14; *Richardson v. Harrison*, 36 Mo. 96; *Nelson v. Haeberle*, 26 Mo. App. 1; *Collins v. McCarty*, 68 Tex. 150 [3 S. W. Rep. 730; 2 Am. St. Rep. 475]; *Ewing v. Shannahan*, 113 Mo. 188 [20 S. W. Rep. 1065]; *Crawley v. Richardson*, 78 Ga. 213.

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WOODMANSEE, J.

The plaintiff is the administrator with the will annexed and trustee of the estate of Lucy Howard, deceased. The said Lucy Howard died on April 25, 1885, and by her will disposed of certain personal and real estate as follows:

"I give and bequeath all the rest and residue of my personal estate after the payment of my just debts and charges and all the foregoing legacies to Roswell F. Howard, upon trust, to place the same at interest and from time to time to appropriate the interest and income arising therefrom in such proportions as he may judge expedient to the maintenance and support of Lucy F. Welch during her natural life. I also give and devise my house and lot where I now reside situate in College Hill in Hamilton county, Ohio, to Roswell F. Howard in trust to take and receive during the natural life of Lucy F. Welch, the rents and profits therefrom, and therewith make all necessary repairs and pay all taxes and other necessary charges and expenses in and about the same and after such payments deducted shall at such times annually and in such proportions as he may judge expedient appropriate the residue of such rents and profits also to the maintenance and support of said Lucy F. Welch during her natural life. Provided, nevertheless, that if the interest arising from such personal estate when invested as aforesaid together with the rents and profits of the real estate aforesaid shall prove insufficient for the comfortable maintenance and support of the said Lucy F. Welch, my trustee, aforesaid shall expend so much of the principal of my personal estate aforesaid as may be requisite for that purpose; and after the death of the said Lucy F. Welch shall sell and convey the real estate aforesaid for such price as he shall deem proper in fee simple, and the whole proceeds of the sale thereof together with all my personal estate then remaining unconsumed to distribute to Roswell F. Howard, Hiram N. Howard, Stephen F. Howard, Benjamin F. Howard, Lucy Pruden and Cyrus Howard equally, share and share alike."

The beneficiary under that clause of the will, Lucy F. Welch, having died, and Roswell F. Howard, executor and trustee mentioned in the will, having also died, and the plaintiff being regularly appointed his administrator with the will annexed this court is now asked to determine, (1) has the said administrator with the will annexed power and authority under the will to sell the real estate described therein in fee simple; and (2) as a number of the persons mentioned in said will have died since the testatrix, leaving a widow and children, the court is asked to instruct the plaintiff as to whether the share bequeathed to each party should go as real estate or personal property. If the latter, then the said share must be paid to the administrator or executor of such deceased party.

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This court holds that the plaintiff has authority under the terms of the will to sell the said real estate without an order of the court. Section 5986 Rev. Stat.

This court also holds that the property should be distributed as personalty, following *Collier v. Grimescy*, 36 Ohio St. 17:

"Under the direction to sell, the land is to be regarded, for the purposes of distribution as converted into money."

Under the clause of the will before us for construction neither of the parties mentioned are given a control or interest in the real estate, but rather a share of the personal property into which the trustee is directed to convert the real estate.

It is disclosed to the court that Roswell F. Howard, a son of Lucy Howard, one of the devisees under her will, had possession and control of the will under which her estate is divided for more than three years after her death and before it was offered for probate, and that he is therefore disqualified to receive any real estate devised to him under the will.

The statute under which this claim is made is Sec. 5943 Rev. Stat., which reads as follows:

"No lands, tenements or hereditaments, shall pass to any devisee in a will, who shall know of the existence thereof, and have the same in his power to control, for the term of three years, unless, within that time, he shall cause the same to be offered for, or admitted to, probate: and by such neglect, the estate devised to such devisee shall descend to the heirs of the testator."

Hence because of this statute, the heirs at law of the testator claim the share of Roswell F. Howard.

The facts in the case are that Lucy Howard left two wills in the possession and control of her son, Roswell F. Howard. The last will was executed by her on March 17, 1885; the older will was executed November 2, 1882. The latest will was probated within thirty days after the death of the testatrix. A suit was filed to contest that will by one of the sons of the testatrix and on April 30, 1891, a decree was entered in this court finding that such will was not the last will and testament of Lucy Howard. Thereupon, within three days, on May 2, 1891, Roswell F. Howard probated the earlier will of Lucy Howard.

Now, it is claimed that for his delay in offering this will for probate that all the real estate devised to him by said will should be taken from him and given to the heirs at law of Lucy Howard.

The purpose and intent of Sec. 5943 Rev. Stat., is to aid in the prompt administration of the decedent's estate. It seems quite reasonable that a devisee under a will who wrongfully withholds it from probate for a term of three years and thereby retards the

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settlement of the estate and jeopardizes the interests of others who are provided for in the will should be punished therefor.

But this court is clearly of the opinion that Roswell F. Howard did just as a reasonable and prudent man should do under the circumstances. He had both wills in his possession and the older of the two wills was not the last will and testament of Lucy Howard, deceased, until that later will was set aside by decree of court. The court holds that it would have been improper to have filed both wills and besides the filing of both wills would not have facilitated the administration of the estate.

It is ordered that the proceeds of the estate bequeathed in that clause of the will quoted herein be distributed as personalty among the various persons mentioned in said clause or to the personal representatives of their estates.

MUNICIPAL CORPORATIONS—RAILWAY GRADE CROSSINGS—STATUTES.

[Superior Court of Cincinnati, Special Term, April 25, 1908.]

CINCINNATI (CITY) v. PITTSBURGH, C. C. & ST. L. RY.

1. GRADE CROSSING ACT NOT INVALIDATED BY SEPARABLE PROVISION CONFERRING UNCONSTITUTIONAL POWER ON CIRCUIT COURT.

Section 2 of act 96 O. L. 356 (Lan. Rev. Stat. 5323; B. 3337-17b), relating to elimination of railroad grade crossings in municipalities, in so far as it submits to the circuit court the determination of public safety requiring the abolition of grade crossings and the reasonableness and practicability of plans proposed upon inability of the railway company and municipality to agree, is invalid in that it exceeds the jurisdiction prescribed for such courts by Art. 4, Sec. 6 of the constitution; but as this provision may be eliminated without affecting the purport and efficiency of the act, especially in a case where no disagreement is in issue, the rest of the enactment will stand.

2. CITY MAY DIVERT, ETC., STREETS TO EFFECT GRADE CROSSINGS.

Sections 1, 2 and 5 of act 96 O. L. 356, authorizing construction of ways and crossings above and under railway tracks, and appropriation of land to make necessary alterations to obviate grade crossings, sufficiently confer upon municipal councils authority for the alteration, diversion and relocation of streets and creation of new ways made necessary by the improvement, and the manner of doing it is simply one of detail, dependent on topography or situation of the surrounding lands, which, when exercised reasonably, is not subject to review by the courts. Other statutes not *in pari materia* cannot control the provisions of this act granting to the city such rights in its streets.

3. CONSTRUCTION OF VIADUCT PIERS IN STREET PERMITTED IN PLAN TO OBLVIATE GRADE CROSSINGS.

The construction of a viaduct by a municipality to eliminate a grade crossing, requiring erection of piers in a street, does not infringe upon the policy against placing permanent structures in the street, where they are so situated as not to interfere with public travel, and where any other plan of construction would be prohibitive by reason of its enormous cost.

[Syllabus approved by the court.]

Cincinnati v. Railway.

Geoffrey Goldsmith, assistant city solicitor, for plaintiff:

Cited and commenced upon the following authorities: *Treasurer v. Bank*, 47 Ohio St. 504 [25 N. E. Rep. 697; 10 L. R. A. 196]; *Bowles v. State*, 37 Ohio St. 35; *Wabash Ry. v. Defiance*, 52 Ohio St. 262 [40 N. E. Rep. 89]; *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738]; *Louisville & N. Ry. v. Cincinnati*, 76 Ohio St. 481 [81 N. E. Rep. 983].

W. W. Ramsey, for defendant:

Cited and commented upon the following authorities: *Louisville & N. Ry. v. Cincinnati*, 76 Ohio St. 481 [81 N. E. Rep. 983]; *Kent v. Mahaffy*, 2 Ohio St. 498; *Hubble v. Renick*, 1 Ohio St. 170; *Warren v. Charlestown*, 68 Mass. (2 Gray) 84; *Pollock v. Loan & Tr. Co.* 158 U. S. 601 [15 Sup. Ct. Rep. 912; 39 L. Ed. 1108]; *Poindexter v. Greenhow*, 114 U. S. 270 [5 Sup. Ct. Rep. 903; 29 L. Ed. 185]; *Bloom v. Xenia*, 32 Ohio St. 461; *Delaware L. & W. Ry. v. Buffalo*, 158 N. Y. 266 [53 N. E. Rep. 44]; *Lake Shore & M. S. Ry. v. Elyria*, 69 Ohio St. 414 [69 N. E. Rep. 738]; *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118 [12 N. E. Rep. 445]; *Cincinnati v. Railway*, 16 Dec. 628; *Wabash Ry. v. Defiance*, 52 Ohio St. 262 [40 N. E. Rep. 89]; *Zanesville v. Fannan*, 53 Ohio St. 605 [42 N. E. Rep. 703; 53 Am. St. Rep. 664]; *Louisville & N. Ry. v. Cincinnati*, 17 Dec. 689.

SPIEGEL, J.

On May 2, 1902, in answer to a general demand from the cities and towns of the state, the seventy-fifth general assembly passed an act to abolish grade crossings in municipal corporations. It is a statute separate and apart from, and not *in pari materia* with, other acts on kindred subjects, and must, therefore, be construed in its own light. Thousands of human beings were annually either maimed or killed at these crossings, and the act was passed to give the municipality power to abolish this terrific evil. The statute, with certain changes made April 2, 1906 (95 O. L. 356, Sec. 1; Lan. Rev. Stat. 5322; B. 3337-17a), provides, in substance, that any municipal corporation may raise or lower the grade of any street above or below any railroad track therein and may require any railroad company to raise or lower the grade of its tracks and construct ways and crossings that are to be passed under its tracks whenever the legislative body of the municipality deems it necessary.

It may, by ordinance (Sec. 2, Lan. Rev. Stat. 5323; B. 3337-17b), require the railroad company in co-operation with the city engineer or other engineer designated by the board of legislation to prepare and submit to it within six months, unless longer time is mutually agreed upon, plans and specifications for such improvement, specifying the grades to be established for the streets and the height, character and

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estimated cost of any viaduct or any way above or below any railroad tracks, and the change of grade required to be made of such track, including side tracks and switches. If the railroad company refuses to co-operate in this work, then the engineer may prepare such plans and specifications satisfactory to the board of legislation and the latter, or, in case of disagreement between the board and the railroad company as to the plans and specifications, either party may submit the question to the circuit court having jurisdiction in the county wherein said municipal corporation is situated, which court after examination of such plans and specifications and after hearing the evidence shall make a finding whether the public safety requires such an improvement and whether such plans are reasonable and practicable. If so, the city may proceed; if not, the improvement cannot be made upon such plans. This section further provides:

“But in changing of grade of any railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark.”

Section 3 (Lan. Rev. Stat. 5324; B. 3337-17c) provides that “The cost of the construction of the improvement authorized, including the making of ways, crossings or viaducts, above or below the railroad tracks, and also including the raising or lowering of the grades of the railroad tracks and side tracks for such distance as may be required by such municipality and made necessary by such improvement, together with the cost of any land or property purchased or appropriated, and damages to owners of abutting property, or other property, shall be borne one-half by any municipality and one-half by any such railroad company or companies.” This section further provides the manner of judicial inquiry into damages and the mode and time of payment of the railroad company's proportion of cost.

Section 4 (Lan. Rev. Stat. 5325; B. 3337-17d) fixes the height of viaducts.

Section 5 (Lan. Rev. Stat. 5326; B. 3337-17e) I shall cite in full because it becomes very important in construing the scope and operation of the statute

“The land or property required to make any alterations in the street or highway necessitated by the proposed improvement shall be purchased or appropriated by the municipality or company after the manner provided by law for the appropriation of private property for public use, and the land or property required to make any alteration in the railroad or railroads necessitated by the proposed improvement shall be purchased or appropriated by the railroad company or companies

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after the manner provided for the appropriation of private property by such corporation; but the municipality shall not appropriate land held or owned by any railroad company necessary for the use of such railroad company in maintaining and operating its road."

The other sections of the statute provide for the cost of maintenance of the improvement, its apportionment between the municipality and the railroad company, the tax levy, the proportion of the share of expenses that railways shall bear, and the final section which provides that "all acts and parts of acts in conflict or inconsistent with this act are hereby repealed."

In accordance with the statute the board of legislation of the city of Cincinnati passed the necessary ordinances and together with the defendant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, agreed upon plans and specifications necessary to obliterate one of Cincinnati's death traps, the Rookwood grade crossing on Eastern avenue, making it a work of magnitude owing to the topography of the ground, on one side the Ohio river and the railroad yards with its numerous tracks and on the other Cincinnati's hills, which necessitated in the judgment of the board of legislation and the railroad company the abandonment of a part of Eastern avenue, its relocation and the building of a large viaduct supported by eight stone piers in the middle of Eastern avenue thus relocated.

The city solicitor of Cincinnati, in pursuance of his duty, before the incurring of any expense on the part of the city, instituted a suit in this court to test the constitutionality of the act, and the case was tried before me on the law and the facts. The objections raised by the city solicitor to the act are as follows:

1. That the grade abolition statute, the only source of power of council in the premises, is invalid—

a. Because the court-resort provision thereof is void, as contrary to Art. 4, Sec. 6 of the constitution of Ohio.

b. Because the court-resort provision being unconstitutional, the entire statute must fall, it being inseverable.

2. That Eastern avenue, between Crane and Litherbury streets, is a dedicated street; that it has not been condemned; and therefore the intended diversion of the street from street purposes is beyond powers of council.

3. If the statute is not invalid, nevertheless it does not confer powers claimed in the premises by council, which has only those powers expressly given or necessarily implied.

a. There is no express or implied power to erect piers or abutments in public streets.

b. There is no express or implied power permanently or exclusively to occupy a street.

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- c. There is no express or implied power to obstruct a street.
- d. There is no express or implied power to relocate a street.
- e. There is no express or implied power for new occupancy of streets.
- f. There is no express or implied power transversely to cross over and along the entire length of a street.

Before entering upon the questions raised by the solicitor, let us examine the statute as it stands. I have already stated that the act is not *in pari materia* with other statutes incidentally referring to the same subject, because its scope and aim are distinct and unconnected. In order to ascertain its aim the court is warranted in availing itself of all legitimate aids to ascertain its true intentions. Among such are extraneous facts of which the court may take judicial notice. The object sought to be accomplished by the passage of the statute exercises a potent influence in determining the meaning of not only the principal but also of the minor provisions of the statute. To ascertain it fully, the court is greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced its enactment. Now, it is a notorious fact, of which the court takes judicial notice, that railroad grade crossings in large and small cities have demanded innumerable human sacrifices until the evil called aloud to the legislature for redress, resulting in the passage of the act under discussion. It is, therefore, a statute which concerns the public good or the general welfare, and falls by virtue thereof under the class of remedial statutes, and the rule is that, in construing a remedial statute which has for its end the promotion of important and beneficial public objects, a large construction is to be given, when it can be done without doing actual violence to its terms in order to suppress the mischief and advance the remedy. For this purpose, it is a settled rule to extend the remedy as far as the words will admit, that everything may be done in virtue of the statute in advancement of the remedy that can be done consistently with any construction.

Keeping this in view, let us now consider the objections raised by the city solicitor. Taking the first, it is his claim that the statute is void because Sec. 2 of the act provides that if the municipality and the railroad are unable to agree on the plans and specifications, the matter may be submitted by either party to the circuit court for a determination whether public safety requires an abolition of the grade crossing, and whether the plans are reasonable and practicable. Article 4, Sec. 6 of the constitution of Ohio, however, provides that the circuit court shall only have like original jurisdiction with the Supreme Court and such appellate jurisdiction as may be provided by law. And Article 4, Sec. 2 of the constitution provides that the Supreme Court shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*;

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that, therefore, the giving of original jurisdiction to the circuit court in this matter is a violation of the constitutional provisions just quoted, and that, therefore, the statute is void.

Taking for granted this objection is well taken, then said part of Sec. 2, placing this duty upon the circuit court, may be eliminated without affecting the sufficiency and purport of said act, when and wherever the municipality and railroad company, as in the case at bar, agree that public safety requires such improvement to be made, and also agree upon the plans and specifications. This is in accordance with the well known rule stated by Judge Cooley in his work on Constitutional Limitations, page 246:

“A statute may contain some such (unconstitutional) provisions, and yet the same act having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, but yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.” See also, *Treasurer v. Bank*, 47 Ohio St. 504 [25 N. E. Rep. 697; 10 L. R. A. 196]; *Bowles v. State*, 37 Ohio St. 35.

Applying this rule of construction to the act in question, I hold that that part of the statute, granting power to the circuit court, must be eliminated, and the rest of the enactment stand.

The objection raised by the city solicitor that Eastern avenue between Crane and Litherbury streets is a dedicated street, and that it has not been condemned between these streets, and that therefore its intended diversion from street purposes is beyond the power of the board of legislation, may be disposed of in a few words.

The testimony showed that the abutting property owners are on

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one side the railway and on the other side the city itself by reason of its expropriation proceedings under this act. This is, therefore, not a case of public common where the property would revert to the original dedicators, but of a public street where it reverts to the abutting property holders—in this case the contesting parties.

The building of each viaduct depends upon its peculiar topographical features, and the act outlines in general terms the powers given to municipalities to carry out its purpose. Statutes are seldom written in such precise or categorical terms as to point out inclusively and exclusively all their intended applications. General and more or less flexible language is used. A statute is construed with reference to the subject of the act—its purpose. When the legislature gives power to a public body to do anything of a public character, the legislature means also to give to such body all rights without which the power would become wholly unavailable.

Where a power is granted and the mode of its exercise not described, it will be implied that it is nevertheless to be exercised. As stated by Judge Minshall in *Doyle v. Doyle*, 50 Ohio St. 330, 341 [34 N. E. Rep. 166]:

“That which is plainly implied in the language of a statute is as much a part of it as that which is expressed. * * * No statute should be so construed as to lead to an absurd result.”

The statute in Secs. 1 and 2 authorizes the construction of ways and of crossings above and under the track of a railroad, the specifications of the grades to be established for the streets, and in Sec. 5 expressly provides that the land or property required to make any alterations in the street or highway necessitated by the proposed improvement shall be appropriated by the municipality. This certainly gives express authority for the alterations of streets, and the manner of doing it is simply one of the details left to the judgment of the municipality, dependent upon the situation of the surrounding lands, and, if exercised reasonably, not subject to review by the courts. It is one of the implied powers necessarily granted to carry into effect the purpose of the statute. So is the power of relocating the street and of creating new ways made necessary by the improvement. It certainly cannot have been the intent of the lawmakers that each of these acts would have to be done in pursuance of other statutes not *in pari materia* with the act under consideration granting to the city rights in its streets.

Finally, the city solicitor raises the question that there is no express or implied power given to the board of legislation to place piers in Eastern avenue to support the viaduct. The act in question is not one granting franchises to a railroad company, but is a statute in furtherance of a public necessity and, as I have shown, must therefore be liberally construed. There is no question that a municipality under existing laws

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cannot by ordinance or otherwise grant a right to a railroad company to encumber the city streets with piers or abutments solely for the benefit of said railroad company. The enactment we are now considering, however, does nothing of the kind. It is a statute passed by the general assembly granting powers to and imposing a duty upon the municipalities of the state to abate an evil, leaving the manner of the abatement in each instance to the legislative body together with the railroad company, imposing upon each one-half of the expense of making the improvement and its maintenance.

The evidence in the case before me shows that in order to comply with the requirement of Sec. 2 of the statute, namely, that no grade shall be required to exceed the established maximum grade of that division of the railroad in which the improvement is to be made without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark, it becomes necessary to build the viaduct with abutments and piers; for if instead of this an arch viaduct were to be built, it would place the grade far above the maximum grade established by the statute, and, further, would place Eastern avenue below the high water mark of our floods.

The evidence further shows that even were the railroad to consent to the change of grade, the cost of the removal of this grade crossing would become prohibitive to the city, as it would add more than \$1,000,000 to the present cost of \$600,000, there being in the city 135 grade crossings which will have to be removed by the city.

I recognize fully that it is the policy of our state to avoid as far as possible the placing of obstructions in our streets, and while the act under consideration clothes the municipality with the necessary implied power to build a viaduct in the manner indicated by the plans and specifications, that this should not be done where and whenever it can be avoided.

The testimony showed that these piers will only be eighteen by fourteen inches, the width of Eastern avenue at that point being fifty-four and one-half feet, leaving a clearance on the north side of the piers of twenty-eight feet and on the south side of sixteen feet. The superintendent of track elevations and subways testified that in Chicago grade crossings had been changed in a similar manner to the plan now under consideration, and that the use of streets thus containing piers therein, leaving the width of the street as here, had not proved any hindrance to travel in said city.

Taking all of this testimony together it clearly shows that the purposes of the act in this instance can only be effected by making this improvement in accordance with the plans and specifications submitted, without obstructing travel in Eastern avenue or subjecting it to high

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water, a local condition of which the court must take judicial notice; and further that, even with the consent of the railway company, any other mode of construction would become prohibitive by reason of its enormous cost, thus avoiding the very scope of the act.

I find, therefore, as a matter of law, that the act in question is a remedial statute, and that in accordance with the well settled rules of law it must be construed largely and beneficially so as to suppress the mischief and advance the remedy, adopting a construction which will appear the most reasonable and the best suited to accomplish its object, and that a construction which would lead to an absurdity must be rejected.

I further find, as a matter of fact, that the plans and specifications adopted by the board of legislation and the railroad company are the only feasible plans under the provisions of the act and the topographical conditions of the land, to carry out the purport of the statute. The prayer of the solicitor for a permanent restraining order must be, therefore, and hereby is, refused.

COUNTIES—LIMITATION OF ACTIONS.

[Allen Common Pleas, March, 1908.]

STATE EX REL. B. F. WELTY, PROS. ATTY. V. OHIO NATIONAL BANK.

1. PROSECUTORS CANNOT SUE FOR DAMAGES FOR RETENTION OF COUNTY MONEYS PRIOR TO APRIL 25, 1898.

Prosecuting attorneys have no capacity to bring suits for recovery of damages for unlawful use and retention of county funds prior to April 25, 1898, the date of the enactment of Sec. 1277 Rev. Stat. giving them such power, such power prior to such date being only in the county commissioners.

2. ACTION FOR DAMAGES FOR UNLAWFUL USE OF COUNTY FUNDS IS FOR USE OF THE COUNTY, AGAINST WHICH THE STATUTE RUNS.

An action by a prosecuting attorney brought under Sec. 1277 Rev. Stat. to recover interest from a bank by way of damages for the alleged unlawful retention and use of county funds, obtained from different county treasurers during a period of twenty years, is an action for the benefit of the county, and not the state, and is governed by the six years' limitations prescribed in Sec. 4981. The mere fact that the action may be brought in the name of the state does not change its character. its character.

3. LIMITATIONS RUN AGAINST ACTIONS ARISING FROM RESULTING TRUSTS.

An action to recover damages for county funds unlawfully used by banks under Sec. 1277 Rev. Stat. arises out of a resulting trust and cannot be maintained in equity regardless of the statute of limitations.

4. STATUTE RUNS AGAINST ACTION FOR FRAUD FROM DISCOVERY THEREOF.

An action for damages for unlawful detention by banks of county funds obtained from county treasurers is not one for equitable relief upon the ground of fraud; but if it were, the statute would begin to run from the time the fraud was or ought to have been discovered.

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5. MEASURE OF RECOVERY IS PROFITS, OR INTEREST AT LEGAL RATE.

The measure of recovery in such action is the amount of profit accruing to the bank from the use of the county funds; and if it is impracticable or impossible to determine exactly the amount of this profit, interest should be allowed at the rate of 6 per cent.

[Syllabus approved by the court.]

B. F. Welty, Pros. Atty., Frank Downing and John Roby, for plaintiff.

Jas. W. Halfhill, for defendant:

Cited and commented upon the following authorities: *Vindicator Ptg. Co. v. State*, 68 Ohio St. 362 [67 N. E. Rep. 733]; *Wood, Limitations Sec. 53*; *Beck Street Opening, In re*, 19 Misc. 571 [44 N. Y. Supp. 1087]; *Pimental v. San Francisco*, 21 Cal. 351; *Bedford (City) v. Williard*, 133 Ind. 562 [33 N. E. Rep. 368; 36 Am. St. Rep. 563]; *Pella (City) v. Scholte*, 24 Iowa 283 [95 Am. Dec. 729]; *Rowan v. Portland*, 47 Ky. (8 Mon. B.) 232; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Denton v. Jackson*, 2 Johns Ch. (N. Y.) 320; *May v. School District*, 22 Neb. 205 [34 N. W. Rep. 377; 3 Am. St. Rep. 266]; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326 [1 S. E. Rep. 740; 6 Am. St. Rep. 644]; *Johnson v. Black*, 103 Va. 477 [49 S. E. Rep. 633; 68 L. R. A. 264; 106 Am. St. Rep. 890]; *San Luis Obispo Co. v. Farnum*, 108 Cal. 567 [41 Pac. Rep. 447]; *McClanahan v. Lunatic Asylum*, 88 Va. 466 [13 S. E. Rep. 977]; *Graham Co. (Comrs.) v. Van Slyck*, 52 Kan. 622 [35 Pac. Rep. 299]; *San Diego Co. v. Dauer*, 131 Cal. 199 [63 Pac. Rep. 338]; *Keokuk Co. v. Howard*, 41 Iowa 11; *Evans v. Erie Co.* 66 Pa. St. 222; *Cincinnati v. Presbyterian Church*, 8 Ohio 299 [32 Am. Dec. 718]; *Williams v. Presbyterian Soc.* 1 Ohio St. 478; *Cincinnati v. Evans*, 5 Ohio St. 594; *Lane v. Kennedy*, 13 Ohio St. 42; *Oxford Tp. v. Columbia*, 38 Ohio St. 87; *Hartman v. Hunter*, 56 Ohio St. 175 [46 N. E. Rep. 577]; *Wasteney v. Schott*, 58 Ohio St. 410 [51 N. E. Rep. 34]; *State v. Conway*, 18 Ohio 234; *State v. Blake*, 2 Ohio St. 147; *State v. Henderson*, 40 Iowa 242; *United States v. Railway*, 70 Fed. Rep. 435; *United States v. Navigation & Ry. Co.* 142 U. S. 510 [12 Sup. Ct. Rep. 308; 35 L. Ed. 1099]; *State v. Board of Pub. Wks.* 36 Ohio St. 409; *State v. Railway*, 53 Ohio St. 189 [41 N. E. Rep. 205]; *State v. Griftnier*, 61 Ohio St. 201 [55 N. E. Rep. 612]; *State v. Tin & Japan Co.* 66 Ohio St. 182 [64 N. E. Rep. 68]; *Hawkins v. Lasley*, 40 Ohio St. 37; *Ncal v. Nash*, 23 Ohio St. 483; *Adelbert College v. Railway*, 5 Dec. 14 (3 N. P. 15); *Bryant v. Swetland*, 48 Ohio St. 194 [27 N. E. Rep. 100]; *Swan v. Shahan*, 1 Circ. Dec. 119 (1 R. 216); *Gray v. Kerr*, 46 Ohio St. 652 [23 N. E. Rep. 136]; *Neilson v. Fry*, 16 Ohio St. 552 [91 Am. Dec. 110]; *Carpenter v. Canal Co.* 35 Ohio St. 307; *Raymond v. Moore*, 13 Dec. Re. 657 (1 C. S. C. 456); *Ashurst's Appeal*, 60 Pa. St. 290; *Kinne v. Webb*, 54 Fed. Rep. 34 [4 C. C. A. 170; 12 U. S. App. 137]; *Campbell v. Iron Co.* 83 Ala. 351 [3 So. Rep. 369]; *Perkins v. Cartmell*, 4 Har. (Del.) 270 [42 Am.

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Dec. 753]; *Castner v. Walrod*, 83 Ill. 171 [25 Am. Rep. 369]; *Ewin v. Ware*, 41 Ky. (2 Mon. B.) 65; *Ela v. Ela*, 158 Mass. 54 [32 N. E. Rep. 957]; *Curtner v. United States*, 149 U. S. 662 [13 Sup. Ct. Rep. 985; 37 L. Ed. 890]; *Drumright v. Hite*, 26 S. E. Rep. 583 (Va. App.); *Florida Mtg. & Inv. Co. v. Finlayson*, 91 Fed. Rep. 13 [33 C. C. A. 307; 62 U. S. App. 582]; *Sioux City & St. P. Ry. v. O'Brien Co.* 118 Iowa 582 [92 N. W. Rep. 857]; *Watson v. Railway*, 73 S. W. Rep. 830 (Tex.); *Godden v. Kimmell*, 99 U. S. 201 (25 L. Ed. 431); *Sullivan v. Railway*, 3 Dill. 334 [23 Fed. Cas. 368]; *Hall v. Russell*, 3 Sawy. 506 [11 Fed. Cas. 248]; *Phalen v. Clark*, 19 Conn. 421 [50 Am. Dec. 253]; *Richardson v. Gregory*, 126 Ill. 166 [18 N. E. Rep. 777]; *Smith v. Wood*, 42 N. J. Eq. 563 [7 Atl. Rep. 881]; *McCrea v. Purmort*, 16 Wend. 460 [30 Am. Dec. 103]; *Tucker v. Linn*, 57 Atl. Rep. 1017 (N. J.); *People v. Railway*, 145 Mich. 140 [108 N. W. Rep. 772]; *Nash v. Ingalls*, 13 O. F. D. 247 [101 Fed. Rep. 645; 41 C. C. A. 545]; *Yearly v. Long*, 40 Ohio St. 27; *Harrod v. Carder*, 2 Circ. Dec. 274 (3 R. 479); *Beckford v. Wade*, 17 Ves. Jr. 87; *Clegg v. Edmondson*, 8 DeG. M. & G. 787; *Wentworth v. Lloyd*, 32 Beav. 467; *Kate v. Bloodgood*, 7 Johns Ch. (N. Y.) 90 [11 Am. Dec. 417]; *Lammer v. Stoddard*, 103 N. Y. 672 [9 N. E. Rep. 328]; *Kansas City So. Ry. v. Stevenson*, 135 Fed. Rep. 553; *Hendrickson v. Hendrickson*, 42 N. J. Eq. 657 [9 Atl. Rep. 742]; *Hackett v. Pratt*, 5 Kan. App. 586 [49 Pac. Rep. 100]; *Merton v. O'Brien*, 117 Wis. 437 [94 N. W. Rep. 340]; *Gilmore v. Ham*, 142 N. Y. 1 [36 N. E. Rep. 826; 40 Am. St. Rep. 554]; *Sheppards v. Turpin*, 44 Va. (3 Gratt.) 373; *Wilmerding v. Russ*, 33 Conn. 67; *Speidel v. Henrici*, 120 U. S. 377 [7 Sup. Ct. Rep. 610; 30 L. Ed. 718]; *Newman v. Newman*, 60 W. Va. 371 [55 S. E. Rep. 377]; *Lewin*, Trusts 863; *Stubbins v. Briggs*, 24 Ky. Law 230 [68 S. W. Rep. 392]; *Ward v. Ward*, 12 Circ. Dec. 59; *Townsend v. Eichelberger*, 51 Ohio St. 213 [38 N. E. Rep. 207]; *Douglas v. Corry*, 46 Ohio St. 349 [21 N. E. Rep. 440; 15 Am. St. Rep. 604]; *Larwill v. Burke*, 10 Circ. Dec. 605 (19 R. 449); *Central Nat. Bank v. Insurance Co.* 104 U. S. 54 [26 L. Ed. 693]; *Knatchbull v. Hallatt*, 13 Ch. Div. 696; 3 Pomeroy, Eq. Jurisp. (3 ed.) 2019; *Englar v. Offutt*, 70 Md. 78 [16 Atl. Rep. 497; 14 Am. St. Rep. 332]; *Harrison v. Smith*, 83 Mo. 210 [53 Am. Rep. 571]; *Ellicott v. Kuhl*, 60 N. J. Eq. 333 [46 Atl. Rep. 945]; *Burnham v. Barth*, 89 Wis. 362 [62 N. W. Rep. 96]; *State v. Bank*, 61 Neb. 181 [85 N. W. Rep. 43; 52 L. R. A. 858]; *Continental Nat. Bank v. Weems*, 69 Tex. 489 [6 S. W. Rep. 802; 5 Am. St. Rep. 85]; *Bonne Co. Nat. Bank v. Latimer*, 67 Fed. Rep. 27; *Massey v. Fisher*, 62 Fed. Rep. 958; *State v. Foster*, 5 Wyo. 199 [38 Pac. Rep. 926; 29 L. R. A. 226; 63 Am. St. Rep. 47]; *Independent Dist. of Boyer v. King*, 80 Iowa 497 [45 N. W. Rep. 908]; *Baker v. Bank*, 100 N. Y. 31 [53 Am. Rep. 150]; *Importers & Trad. Nat. Bank v. Peters*, 123 N. Y. 272 [25 N. E. Rep. 319]; *Heidelbach v.*

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Bank, 87 Hun 117 [33 N. Y. Supp. 794]; *Sherwood v. Bank*, 103 Mich. 109 [61 N. W. Rep. 352]; *Lincoln (City) v. Morrison*, 64 Neb. 822 [90 N. W. Rep. 905; 57 L. R. A. 885]; *Slater v. Oriental Mills*, 18 R. I. 352 [27 Atl. Rep. 443]; *Standish v. Babcock*, 52 N. J. Eq. 628 [29 Atl. Rep. 327]; *Wulbern v. Timmons*, 55 S. C. 456 [33 S. E. Rep. 568]; *State v. Bank*, 54 Neb. 725 [75 N. W. Rep. 28]; *Holmes, In re*, 159 N. Y. 532 [53 N. E. Rep. 1126]; *Smith v. Combs*, 49 N. J. Eq. 420 [24 Atl. Rep. 9]; *United Nat. Bank v. Weatherby*, 70 App. Div. 279 [75 N. Y. Supp. 3]; *Steinway, In re*, 37 Misc. 704 [76 N. Y. Supp. 452]; *Kimmel v. Dickson*, 5 S. D. 221 [58 N. W. Rep. 561; 25 L. R. A. 309; 49 Am. St. Rep. 869]; *Crawford Co. (Comrs.) v. Patterson*, 15 O. F. D. 275 [149 Fed. Rep. 229]; *Blair v. Hill*, 50 App. Div. 33 [63 N. Y. Supp. 670]; *Shields v. Thomas*, 71 Miss. 260 [14 So. Rep. 84; 42 Am. St. Rep. 458]; *Metropolitan Nat. Bank v. Commission Co.* 77 Fed. Rep. 705; *Ellicott v. Kuhl*, 60 N. J. Eq. 333 [46 Atl. Rep. 945]; *Ferchen v. Arndt*, 26 Ore. 121 [37 Pac. Rep. 161; 29 L. R. A. 664; 46 Am. St. Rep. 603]; *Texas Moline Plow Co. v. Implement Co.* 80 S. W. Rep. 1042 (Tex. Civ. App.); *Ober v. Cochran*, 118 Ga. 396 [45 S. E. Rep. 382; 98 Am. St. Rep. 118]; *Little v. Chadwick*, 151 Mass. 109 [23 N. E. Rep. 1005; 7 L. R. A. 570]; *Johns v. Kilbreth*, 49 Ohio St. 401 [31 N. E. Rep. 346].

MATHERS, J.

It will not be necessary for the court at this time to state formally the issues joined. They seem to be fully set out in the briefs and I think everybody interested in the case is familiar with them. In brief, this is an action by the prosecuting attorney to recover interest, by way of damages, for the alleged unlawful use of county funds which the defendant obtained from the several treasurers covering the period between 1888 and the filing of this petition.

Various defenses are interposed, among them the statute of limitations, and that the plaintiff has no capacity to sue, as well as the defense upon the merits, it being contended by the defendant that if this be a trust fund and impressed with that character, yet as long as the defendant had an amount equal to the amount belonging to the beneficiary in its possession, equity will presume that it was using its own funds in its business and not that it was using the trust fund.

Regardless of the statute of limitations it is quite clear that the relator has no capacity to sue in this action for alleged wrongs committed prior to April 25, 1898, the date of the enactment of Sec. 1277 Rev. Stat. as it now stands. That point was determined in *State v. Zumstein*; 2 Circ. Dec. 539 (4 R. 268), which was affirmed by the Supreme Court on the reasoning of the circuit court, *State v. Zumstein*, 30 Bull. 275. For causes of action arising prior to that date, if any county authority might sue, it would be the county commissioners.

Does the statute of limitation operate to bar an action such as

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this? The character of the real party in interest will determine. If it be the state, then the statute does not apply. *Seeley v. Thomas*, 31 Ohio St. 301, 308, citing *Greene Tp. (Tr.) v. Campbell*, 16 Ohio St. 11. If the county, then the statute does apply. *Hartman v. Hunter*, 56 Ohio St. 175, 180 [46 N. E. Rep. 577], and the cases cited. And so, even though the subject-matter of the action be public funds wrongfully withheld (*Mount v. Lakeman*, 21 Ohio St. 643. where it was held that an action on behalf of a township to recover school funds which a treasurer had appropriated to his own use, is barred by the limitation of six years); and the case of *Oxford Tp. v. Columbia*, 38 Ohio St. 87, where it was held that "trustees of a township, holding title to lands granted to them by the general government for school purposes, are not exempt from the operation of the statute of limitations, in an action prosecuted by them to recover possession of the premises."

The relator in this case is able to maintain the action only because of his official position as county prosecuting attorney, and by virtue of Sec. 1277 Rev. Stat. That section specifically provides that any public moneys illegally withdrawn or withheld may be by him recovered back for the use of the county, and nowhere does it provide that it shall be for the use of the state, or that he has a right to sue and recover back such funds. That would properly come within the scope of the duty of the attorney-general, who is the only one authorized generally, without special statutory authority, to appear in the courts in behalf of the state.

In this action it is sought to recover interest by way of damages for the retention and use of the county's funds. If recovered, I think it very doubtful if the state would receive any benefit from, or be entitled to, any of the amount so recovered. At any rate, the section under consideration contemplates the suit for the benefit of the county, and it would appear that it was the county's funds that were to be made the subject of the action. It is true the name of the state may be used, but this is permissive for the purpose of convenience, and I think it would hardly follow as a consequence that the mere title of the action would affect a right so substantive and valuable as that of the repose of the statute of limitations. The real party in interest is the county and, from what has been said, the statute runs against the county. This is so unless this be one of the causes of action which equity will entertain regardless of the statute of limitations; in other words, a cause of action which arises out of a trust of a certain character and which is not permitted, because of equitable considerations, to be barred.

Is the trust here involved of that character? I think there is no disagreement about it being a resulting trust. In *Yearly v. Long*, 40 Ohio St. 27, 32, it was said—

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"The class of trusts which as between the trustee and *cestui que trust* is not barred by the statute, embraces those technical, direct and express trusts which are of a nature cognizable solely in equity. It would not, therefore, include the almost innumerable cases of implied and constructive trusts so-called, as for example, deposits or bailments not special in their character, or other trusts analogous to these."

In *Carpenter v. Canal Co.* 35 Ohio St. 307, 317, it was held that trusts which might be the ground of an action at law were not exempted from the operation of the statute.

And in *Bryant v. Swetland*, 48 Ohio St. 194, 206 [27 N. E. Rep. 100], it was said:

"It is firmly settled in this state, that the statute of limitations applies to all civil actions, whether they be such as before the adoption of the code of civil procedure were called actions at law or suits in equity, except certain specified actions which the statute expressly exempts from its operation."

The code abolished the distinction between forms of action in this state, although of course it could not abolish the inherent differences between the rights sought to be made the subject of actions and the consequent duties which those rights impose upon others; and, while the fundamental principles underlying the differences between legal and equitable procedure necessarily exist and will exist, yet when it comes to the practice of them the legislature, which has provided that there shall be but one form of action, meant that the statute of limitation should apply to that form of action, unless there was some special exemption. In fact the Supreme Court says, in the case of *Bryant v. Swetland*, *supra*, that "the statute of limitations applies to all civil actions, whether they be such as before the adoption of the code of civil procedure were called actions at law or suits in equity, except certain specified actions which the statute expressly exempts from its operation." The only exceptions as to trusts that I recall are that continuing and subsisting trusts are not subject to the provisions of that chapter. I do not think that this could be called that kind of a trust. It is, as I said before, and there seems to be no contention about it, a resulting trust.

By 1 Pomeroy, Eq. Jurisp. (2 ed.) Sec. 418, it seems that the statute of limitations may be invoked in all classes of cases, except in those brought to enforce a trust against an express trustee, and that it may be invoked even in suits to obtain remedy against fraud, on the principle that "equity aids the vigilant," which is merely an extension of the maxim that, "he who seeks equity must do equity."

In the case at bar there was no express trust; hence, on the authority of Pomeroy, *supra*, and *Yearly v. Long*, *supra*, this is not of that character of trust which is within the exception of the statute.

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I am of the opinion, therefore, that the statute of limitations applies. The court is further of the opinion that the action is governed by the limitations prescribed by Sec. 4981 Rev. Stat. And this upon the authority of the case of *Mount v. Lakeman, supra*. It seems that there would be an implied contract that not only the principal but the increment would be repaid when the relation of trustee and beneficiary arises. While it may not arise out of any intention to assume that relation, yet the law would imply such a contract between the two which might be enforceable in equity.

I do not think this is an action for relief on the ground of fraud, and if it were the statute would begin to run from the time when the fraud was discovered or ought to have been discovered. 2 Pomeroy, Eq. Jurisp. Sec. 917. And surely the presence among the funds in the treasurer's office of certificates of deposit, which admittedly were there, ought to have put the commissioners on inquiry, for a certificate of deposit is not cash.

The court is equally clear that there is no merit in the defendant's contention that as long as there was sufficient funds in the bank to pay in full all the moneys of the treasurers there deposited, there was no use by the bank of the county's funds and no commingling of them with its own. The evidence indisputably shows the contrary. It also shows the bank obtained a profit on the use by it of some at least of the county's funds. The bank must be presumed to know the law and to know it had no right to retain or use these funds; but as to those checks drawn on itself to pay them on presentation, and as to those drawn on other banks to collect them in the usual course and pay over the proceeds. As to either kind, if it chose to credit the treasurer's private account instead of making a mere collection memorandum, it must be held to have the cash in its hands to meet that credit and hence to have the county's money. Presumably it found it to its advantage so to credit the treasurer or it would not have done it, and it is a fair inference that the transactions were profitable to it. Hence, as to the credits within six years prior to the commencement of this action, the defendant, having profited by the use of the trust funds, ought to account for this profit to the county, and as it is impracticable if not impossible exactly to determine the amount of this profit, interest at 6 per cent should be allowed.

A decree may be drawn accordingly.

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CONTRACTS—SCHOOLS AND SCHOOL DISTRICTS.

[Pauling Common Pleas, December 18, 1906.]

JOHN McALEXANDER ET AL. v. HAVILAND VILLAGE SCH. DIST. (Bd. of Ed.) ET AL.

1. LEGALITY OF CONTRACT FOR CONSTRUCTION OF SCHOOL BUILDING IN EXCESS OF BOND ISSUE.

A contract for the building of a schoolhouse at a cost in excess of an amount raised for that purpose from a bond issue, is not illegal and void for want of authority of a board of education to make such contract on the ground that it has underestimated the amount of money needed.

[For other cases in point, see 2 Cyc. Dig., "Contracts," §§ 2924-2953.—Ed.]

2. EFFECT OF CHANGING BID FOR PUBLIC CONTRACT.

A contract for the building of a schoolhouse, awarded to a contractor who has been permitted to change his bid to meet existing conditions of the board, is illegal and void, as being repugnant to, and in violation of, Sec. 2834b Rev. Stat.

[For other cases in point, see 2 Cyc. Dig., "Contracts," §§ 2995-2997; 7 Cyc. Dig., "Schools and School Districts," §§ 218-226.—Ed.]

3. WHEN COURTS WILL RESTRAIN ACTION OF SCHOOL OFFICERS.

Where a board of education has submitted a proposition for a bond issue for the purpose of installing a heating plant in a schoolhouse, to the voters who vote down the same for the third time, further submission of such a proposition will be restrained by injunction as an unwarranted and unauthorized exercise and abuse of authority and discretion of the said board.

[For other cases in point, see 6 Cyc. Dig., "Office and Officers," §§ 439-444; 7 Cyc. Dig., "Schools and School Districts," §§ 186-188.—Ed.]

4. MONEY PAID ON EXECUTED ILLEGAL CONTRACT CANNOT BE RECOVERED.

Public funds paid out on a contract that has been fully executed and completed in good faith and free from fraud or collusion cannot be recovered at the instance of a taxpayer, even though the contract on which the payment was made was illegal and void.

[For other cases in point, see 2 Cyc. Dig., "Contracts," § 3063.—Ed.]

CAMERON, J.

This is an action brought by the plaintiffs, who are property owners and taxpayers in the village school district of Haviland, Paulding county, Ohio, to enjoin the board of education of said school district from calling any other or further elections therein for the purpose of issuing any more or other bonds of said district, for the purpose of either finishing the schoolhouse building or placing therein any heating plant or other thing.

A mandatory injunction is also asked for, requiring said board to institute suit to recover from the contractor who built said schoolhouse the money paid to him by said board therefor, and for all the money necessary to complete said building as contracted for; for a finding of the amount of money illegally paid out by said board on account of, or in connection with, said school building, and for a judgment against said board, the members thereof, and the contractor for the amount so

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found; also for a mandatory injunction requiring said board and the members thereof, to complete the proposed building according to the proposal made by them to the voters of said district; and for general equitable relief.

The original petition in the case was filed in this court December 6, 1905, in which it was averred in substance:

On January 18, 1906, a general demurrer was filed to this petition. This demurrer was sustained, and, on July 6, 1906, the plaintiffs filed an amended and supplemental petition herein, averring in addition to the averments in the original petition, in substance, the following:

On August 13, 1906, a general demurrer was filed to this amended and supplemental petition, which was overruled. Afterwards the defendants (except Baltes) answered as individuals, and as a board. This answer, after several admissions, contains a general denial. Then follows an allegation that the school building had been fully completed, said contract fully performed and executed and the contract price paid long before the said amended and supplemental petition was filed in this case.

It is also averred that the proposition of issuing bonds of said district, in the several amounts named in the petition, was made in good faith and after having first determined by proper resolution of the board that it was necessary to issue the bonds of the district for said purpose. To this answer no reply has been filed. The case has been heard upon the evidence, ably argued, and submitted to the court.

The necessity for the building was declared in a resolution of the board, passed April 10, 1905, and fixing the time for holding the election on May 1, 1905. The result of the election was in favor of issuing the bonds.

On June 14, 1905, the bid for these bonds of the New National Bank, of Columbus, Ohio, in the sum of \$8,150, and accrued interest, was accepted by the board and afterwards, on July 21, 1905, said bonds were ordered to be signed. The bonds were signed and delivered to the purchaser. There is no question but what the money was received for these bonds by the board of education.

After the bonds had been sold, the board (July 21, 1905) directed the clerk to cause notice to be published authorizing the letting of a contract for the erection and completing of a certain schoolhouse in said school district, according to plans and specifications prepared by the architect, J. I. Hale, which notice was published in the Paulding Republican and Paulding Democrat, two newspapers of general circulation in said school district. Under this notice, bids were to be received up to 12 o'clock m., of Friday, August 25, 1905.

On August 25, 1905, at 12 o'clock, the board met for the purpose of opening and considering the bids. Four sealed bids had been re-

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ceived, viz.: Richard Allingham, \$8,853.50; Dutweiler & Silders, \$9,196.31; W. M. Christian, \$9,366; Jacob Baltes, \$9,655.

When these bids were opened it was found that each one exceeded the amount of the proceeds realized from the sale of the bonds, the lowest being more than \$600 above the appropriation. Thereupon, as it appears from the record of the bond, an adjournment was taken until 3:30 P. M. of said day to "allow bidders to refigure their bids."

At this adjourned session, the record shows that Dutweiler & Silders and Jacob Baltes presented a bid for the construction of the new schoolhouse for the sum of \$8,797. This amount still exceeding the appropriation, certain charges and deductions were made, which are specifically set out in the record, and which in the aggregate amount to \$557. (Refers orally to these changes.) No one was present when these changes and deductions were made, except the members of the board, the architect, Baltes and Dutweiler, the other two bidders being absent. There were no defects apparent on the face of any of the bids.

It will be seen that, after deducting the amount allowed for these changes from the last bid of Baltes and Dutweiler & Silders (who seem to have united their bids) it just equalled the amount of money realized from the sale of the bonds, including premium and accrued interest, viz., \$8,240. Thereupon the contract was awarded to Baltes, and afterward on August 31 the contract was signed.

The heating plant mentioned in the resolution of the board, and in the proposition submitted to electors of the district was not provided for or covered by this contract. The legality of this contract is challenged, principally, upon these grounds:

First. Want of authority in the board to make it.

Second. Illegality of bid under which contract was awarded and entered into.

Third. Because illegal and void, under the provisions of Sec. 2834b Rev. Stat.

It was well said by counsel, in the statement of the case, that novel and interesting questions were involved. After a careful examination of the case, the statutes and authorities cited, I agree with counsel in the statement made.

1. WANT OF AUTHORITY IN BOARD TO MAKE CONTRACT.

So far as applicable, Sec. 3991 Rev. Stat. provides:

"When the board of education of any school district determines that it is necessary for the proper accommodation of the schools of such district * * * to erect a schoolhouse * * * or when it becomes known to the board of education that the money provided for * * * the erection of a schoolhouse * * * is not sufficient therefor, and such board ascertains that * * * the erection and furnishing of such

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schoolhouse * * * for which a sufficient sum of money has not been provided, will require a greater tax upon the property of such district than the board is authorized by this title to levy, and that to provide means therefor it will be necessary to issue bonds, it shall make an estimate of the probable amount of money required for such purposes, * * * and at a general election, or special election called for that purpose, shall submit to the electors of the district the question of levying taxes for such purposes," etc.

The section then provides that ten days notice shall be given, etc., of said election.

It will be seen from the section quoted that, "The board shall make an estimate of the probable amount of money needed for the purpose," etc.

The statute does not require that the board must know, in advance, the exact amount of money that will be required. This would, in many cases, be impossible to ascertain. I have no doubt that the members of this board of education honestly believed that \$8,000 would build and finish this school building, and equip it with a modern heating plant. In the light of subsequent events, it is now apparent they were mistaken. It was an error of judgment in estimating the probable costs of the proposed improvements. I do not, and cannot believe that this error, or mistake in estimating the costs of this improvement (when honestly made), so misled, or prejudiced the electors of this school district, or so limited and circumscribed the authority of the board as to make and render null and void the contract with the board, in good faith subsequently made and entered into.

2. ILLEGALITY OF BID UNDER WHICH CONTRACT WAS AWARDED AND ENTERED INTO BY THE BOARD.

It is said in argument, that the bids of Allingham and Christian were unlawful for that they, or either of them, did not comply with, nor conform to, the requirements. There is no evidence before the court upon this subject. However that may be, the bids of Baltes and Dutweiler & Silders, as far as appears, were regular and complied with all the requirements of the board. After the bids were all opened and examined and the board had adjourned, as we have shown, the original bid of Baltes, not because of any defect or mistake apparent upon the face of the bid, was scaled down, various items omitted, parts of building left unfinished, so that his original bid of \$9,655 was so modified and changed that the price finally arrived at by this method, exactly equaled the amount realized from the sale of the bonds. The bid which was accepted, and upon which the contract was awarded, was an entirely different bid from the one originally made. It was a bid made without notice and without competition—a bid changed, altered, and modified to meet the appropriation.

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It seems to me that this was and is in direct violation of Sec. 3988 Rev. Stat. and adjudged cases.

In *McGreevey v. Toledo (Bd. of Ed.)*, 10 Circ. Dec. 724 (20 R. 114), the circuit court say, in syllabus and on pages 728, 729:

“(1). A contract between the board of education and the lowest bidder for an excavation for a schoolhouse, based upon a bid which the contractor was allowed to amend and increase, on account of an alleged mistake which did not appear on the face of the original bid is void under Sec. 3988 Rev. Stat., providing the manner in which such contracts shall be awarded, although the bid as amended was still the lowest bid received.”

“(2). Such contract being void, there can be no recovery thereon, or for the value of the work and labor performed thereunder.”

“After examining the authorities and considering the question, we are of the opinion that the board did not have such authority in this case. As we understand the rule, to permit the amendment of a bid that has been opened and after the bidder has seen the other bids—to permit an amendment then, on account of a mistake, it must be a mistake that appears on the face of the bid. There is no mistake appearing on the face of this bid; it is just a plain bid to do this work for \$1,215, without reciting any calculations, but just the mere words: ‘Excavation, \$1,215.’ ”

“Being of the opinion that this bid could not be amended, is the plaintiff then entitled to recover what the work is reasonably worth? It is claimed by the plaintiff in error that although the board had no right to permit him to amend his bid, the contract having been executed and the work having been performed, he ought to be paid therefor. To hold otherwise, it is urged, would result in hardship to this plaintiff. The rule is well settled that a municipal corporation or a board thereof, has such powers and such powers only as are conferred upon such corporation or such board, by law. If a board or corporation is authorized to make a contract for building, or for any other purpose and is required to conform to certain things before making such a contract, in order to make such a contract those things designated by the law of the state must be complied with, and such conditions are strictly construed in favor of the taxpayers of a municipal corporation and against the right of such corporation or such board, to make such a contract. Those who deal with boards and with municipal corporations are supposed to know what powers they have in the way of making contracts.”

The Supreme Court, in *Beaver v. Institution for Blind*, 19 Ohio St. 97, held:

“In such cases, after the day limited for the filing of such proposals, and after the same have been opened, the trustees are invested with no discretion to permit an amendment or alteration of any such

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proposal on account of any alleged mistake therein, unless the fact of such mistake and the requisite data for correcting the same are apparent on the face of the proposals."

The same principle is held in *State v. Abbott*, 25 O. C. C. 538; *Akron v. France*, 24 O. C. C. 63.

From the foregoing authorities and others that might be cited, I am of the opinion, and so hold, that this bid was not authorized, and was illegal.

3. IS THE CONTRACT ILLEGAL AND VOID UNDER THE PROVISIONS OF SEC. 2834b REV. STAT.?

This section provides:

"The commissioners of any county, the trustees of any township and the board of education of any school district, except in cities of the first class, of first, second and third grade, shall enter into no contract, agreement, or obligation involving the expenditure of money, nor shall any resolution or order for the appropriation or expenditure of money be passed by any board of county commissioners, township trustees or board of education, except in cities of the first class, of first, second and third grade, unless the auditor or the clerk thereof shall first certify that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; which certificate shall be filed and immediately recorded; and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, except in cities of the first class, of first, second or third grade, is fully discharged from the contract, agreement or obligation, or so long as the order or resolution is in force, and all contracts, agreements or obligations, and all orders or resolutions entered into or passed contrary to the provisions of this section, shall be void. Provided, that none of the provisions of this section shall apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

It will be seen that this statute, in express terms, declares, that "All contracts, agreements or obligations, and all orders or resolutions entered into or passed contrary to the provisions of this section, shall be void," unless the auditor or clerk shall first certify that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, etc. It is conceded that the certificate was never made.

In *Lancaster v. Miller*, 58 Ohio St. 558 [51 N. E. Rep. 52], the Supreme Court says:

"Nor will such contracts impose on the corporation a valid obliga-

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tion, even if bids were advertised for pursuant to Sec. 2303, unless the auditor, or clerk, of the corporation, as the case may be, 'shall first certify that the money required for' that purpose 'is in the treasury to the credit of the fund from which it is to be drawn,' etc., as required by Sec. 2702 Rev. Stat."

Original Sec. 2702 (see Lan. 3999; B. 1536-205) Rev. Stat. is almost identical with Sec. 2834b and if the certificate mentioned is essential in the one, it is also in the other.

On page 575, *Lancaster v. Miller*, *supra*, the court, in its opinion, says:

"Contracts made in violation of these statutes should be held to impose no corporate liability. Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of limitations upon the powers of those bodies which these statutes impose."

In *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406 [54 N. E. Rep. 372], the Supreme Court held:

"A contract made by county commissioners for the purchase and erection of a bridge, in violation or disregard of the statutes on that subject is void, and no recovery can be had against the county for the value of the bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party." *Richter v. Building & L. Co.* 27 O. C. C. 793.

From the foregoing authorities, the court holds that the contract made by the board of education of Haviland school district and Jacob Baltes, was illegal and void, because repugnant to, and in violation of, Sec. 2834b Rev. Stat.

The next question for determination is the injunction or restraining order allowed by the probate judge of Paulding county, enjoining the defendant board, from resubmitting the question of issuing bonds to equip this school building with a modern heating plant.

The rule is well settled that courts will not ordinarily undertake, by injunction or otherwise, to control the discretion of boards or other inferior tribunals. It is only where there is an abuse of discretion that courts will interfere.

The circuit court of the first circuit, in case of *Pugh Ptg. Co. v. Yeatman*, 12 Circ. Dec. 477 (22 R. 584), held:

"(1) The presumption is, that public officers—in this case the deputy state supervisors of election—have exercised a sound discretion, and the burden of proof is on the plaintiff to show, with that clearness which is always necessary to move a court of equity to interfere, a state of facts which would constitute an abuse of discretion."

"(2) The courts cannot control public officers in the exercise of their discretion. It is only when the courts find present some of the equitable grounds of fraud or mistake, or find the decision or award to be wrongful, fraudulent, collusive or arbitrary, that they can set aside or restrain their conclusions or determinations."

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Judge Price, late of our own circuit court, and now a member of the Supreme Court, in the case of *Watkins v. Hall*, 7 Circ. Dec. 434, 435 (13 R. 253), held:

"It is very clear that so far are the control and management of the school interests—the selection of the site, and erection and equipment of buildings—committed to the judgment and discretion of the board of education, that a court cannot interfere with the exercise of such judgment and discretion, except where it is abused or overreached, or where the conduct or action of the board proceeds from fraudulent motives, or improper purposes, which would be the same thing in law as a gross abuse of discretion."

In the case now under consideration, the board submitted the question of issuing bonds to pay for the heating plant for this school building three different times: First, bonds in the amount of \$1,300; second, in the sum of \$1,500; third, in the sum of \$1,550, which propositions were voted down by the electors of the district, each time by an increased majority. The question was about to be submitted the fourth time when the board was enjoined.

While I cannot and do not find from the evidence that the members of this board acted honestly, corruptly, or fraudulently, in any matter or thing connected with any of the various transactions growing out of or touching these improvements, contract, bids, bonds, or submissions, yet, we hold that the further submission of the question of issuing bonds to install this heating plant, thereby subjecting the electors of said district to further annoyance, inconvenience, loss of time, and expense, would be an unwarranted and unauthorized exercise and abuse of the authority and discretion of the board.

It is therefore the order and judgment of the court, that the temporary injunction heretofore allowed, restraining said defendant, the board of education of the Haviland village school district, from calling any other or further elections for the purpose of issuing any bonds of the said district for the purpose of placing in said schoolhouse any heating plant, be, and the same is made perpetual.

While the court finds that the contract for the building and construction of said school house was illegal and void, yet the court further finds that said contract has been fully executed, and the building built, completed and paid for, in good faith, free from fraud or collusion on the part of said board, the members thereof, or the contractor.

It is therefore the further order and judgment of the court that the mandatory injunctions prayed for, should be and are refused, as is also the prayer for a finding of the amount of money claimed to be illegally paid out by said board of education on account of said proposed school building; and judgment therefor.

Ohio Dairy Co. v. Railway.

INTERSTATE COMMERCE—INJUNCTIONS—COURTS.

[Lucas Common Pleas, October 12, 1908.]

OHIO DAIRY CO. v. LAKE SHORE & M. S. RY.

STATE COURTS CANNOT CONTROL INTERSTATE COMMERCE FREIGHT RATES.

A state court has no jurisdiction to control interstate commerce freight rates, such matters being reserved to the interstate commerce commission and the federal courts by United States act 24 Stat. at L. 382, Chap. 104. Hence, injunction does not lie in a state court, pending a decision by the interstate commerce commission in other cases involving the same questions, to restrain the imposition of increased freight rates on certain commodities alleged to be unjust and unreasonable.

[Syllabus approved by the court.]

MOTION to dissolve temporary injunction.

G. W. Kinney, for plaintiff.

Doyle & Lewis, for defendant:

Cited and commented upon the following authorities: *Texas & Pac. Ry. v. Oil Co.* 204 U. S. 426 [27 Sup. Ct. Rep. 350; 51 L. Ed. 553]; *Kinnavey v. Railway*, 81 Fed. Rep. 803; *United States v. Railway*, 122 Fed. Rep. 544; *Southern Ry. v. Tift*, 206 U. S. 428 [27 Sup. Ct. Rep. 709; 51 L. Ed. 1124]; *Little Rock & M. Ry. v. Railway*, 47 Fed. Rep. 771; *Central Stock Yards Co. v. Railway*, 112 Fed. Rep. 823, 825; *United States v. Railway*, 142 Fed. Rep. 176; *United States v. Railway*, 122 Fed. Rep. 544; *State v. Northern Securities Co.* 194 U. S. 48 [24 Sup. Ct. Rep. 598; 48 L. Ed. 870]; *Cincinnati, N. O. & T. P. Ry. v. Commission*, 162 U. S. 184 [16 Sup. Ct. Rep. 700; 40 L. Ed. 935]; *Interstate Com. Com. v. Railway*, 167 U. S. 479 [17 Sup. Ct. Rep. 896; 42 L. Ed. 243].

BASSETT, J.

This matter comes up for decision at this time on the motion of the railway company to dissolve the temporary injunction heretofore granted herein, for the reasons that this court has no jurisdiction over the subject-matter, and that the petition does not state facts sufficient to entitle the plaintiff to the relief prayed for.

The plaintiff is an Ohio corporation, with its principal office located in the city of Toledo, and its business is that of purchasing and collecting cream and milk in the states of Ohio and Michigan and elsewhere, and causing the same to be transported by the defendant and other common carriers, from the place of purchase and collection to its creamery in said city and thereafter manufacturing a portion of the same into butter and selling said cream, milk and butter. It is further averred that 30 per cent of all the cream so purchased and collected by

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it, comes from the northern part of Ohio and the eastern part of Michigan and in territory tributary to the lines of the defendant company, and that the amount thus stated has been transported from the territory mentioned to Toledo over the lines of the defendant. The plaintiff says that it has been engaged in that business for a period of between three and four years, and has actually invested in its business about \$150,000.

The cause of the complaint now made by the plaintiff against the defendant is that the latter on or about June 26, 1908, adopted a new schedule of rates for the transportation of cream shipped into the city of Toledo from the territory referred to, which new schedule was to have gone into effect on the first day of August, 1908, but it was not enforced because of the restraining order issued in this cause.

Plaintiff says that the new rates did not affect the transportation of milk, but applied only to the transportation of cream, and that the rates for the transportation of milk remained the same as theretofore, according to the plaintiff's information. It further says that the new schedule for the transportation of cream will result in an increased cost of substantially 50 per cent over the lines of the defendant company for a distance not exceeding sixty miles from Toledo. It further alleges that the price which it pays for cream is based upon the weekly rates fixed by the Elgin Butter Board, and that it would be impossible for plaintiff to pay a greater price for cream purchased by it and make any money, because of the close competition in said business. It is further set forth by the plaintiff that it has no contract with the producers of cream, whereby the said producers are under any obligation to furnish cream to it, and that the custom has been to accept all cream shipped by said producers to the plaintiff and pay for the same at the rates referred to in the petition.

The further allegation is made that the producers of cream could not afford to and could not sell said cream to the plaintiff at the prices so fixed, if they were obliged to pay the above stated increased tariff rate; but that if compelled to pay said increased tariff rate, they would refuse to ship cream to plaintiff.

It is further alleged that if said new tariff rates are permitted to be enforced, the plaintiff will be unable, as the direct result therefrom, to obtain any cream from purchasers on the line of the said defendant's road, over which it now is and heretofore has been receiving 30 per cent of all the cream received by it; to the great and irreparable damage of the plaintiff, for which it has no adequate remedy at law.

The plaintiff says that by reason of the publication of the new schedule of rates by the defendant, knowledge thereof has come to many of the producers, who have been heretofore selling to the plaintiff, and many of said producers have already refused to ship cream to plain-

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tiff, and have notified plaintiff that they will refuse in the future to ship it.

The plaintiff further says that the existing tariff rates set forth in the petition have been and still are fully compensatory and remunerative to the defendant for the service rendered in and about the transportation of cream and that the defendant has been and still is earning profits under, and by means of, said existing tariff rate; that the proposed increased tariff rate was not made necessary by reason of any changed conditions affecting the transportation of cream or the service rendered in connection therewith, and that the same is unreasonable, unjust, vicious, excessive and extortionate, and has been arbitrarily imposed by the defendant.

It is further stated in the petition that there is now pending before the interstate commerce commission, an action or proceeding brought by the Blue Valley Creamery Company and the Beatrice Creamery Company against the Michigan Central Railroad Company and other railroads, in Chicago, which action involves the validity under the interstate commerce law of increased tariff rates, on the transportation of cream, and that the decision of the commission will determine whether or not the railroad companies are justified in charging said increased rates. This language of the pleader may be fairly taken as an admission that the question here presented is a federal question. Or, as stated in his brief, the plaintiff in the case before us "is simply asking that the railroad company be enjoined from changing, unreasonably and unjustly, its existing rates until the question of the justness and reasonableness of the previous rates may be passed upon by the interstate commerce commission."

By its motion to dissolve the temporary injunction, in this case, the defendant challenges the jurisdiction of this court over the subject-matter of the controversy. And contends that not this court but either the interstate commerce commission or the Ohio railroad commission is the proper tribunal to hear and determine, in the first instance, the question of the reasonableness or unreasonableness of the rate in question—according to whether the rate relates to interstate or intrastate shipments.

The federal rate law, so-called, has a national and interstate object and purpose. It is designed to establish uniformity and equality in railroad freight rates in interstate commerce or traffic, because the several states themselves cannot lawfully do so. It is in no sense local or municipal, as distinguished from national or interstate. It is intended to operate upon all the people equally, and, if we may borrow the language of the fifth enumeration of the preamble of the federal constitution, "to promote the general welfare." Its purpose is to pre-

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vent favoritism or discrimination, and to extend to all persons equal opportunities and facilities for receiving and shipping freights of all kind of the same class.

Railway rates enter to a greater extent than might at first thought be supposed, into the business operations of this country. Manifestly, it is an economic hardship and an economic waste for the farm, the mine, or the factory, to put labor and capital into the production of commodities if they cannot be transported to market at reasonable rates and with reasonable dispatch. For many years, the right of railroads to alter or advance their rates went unquestioned, but gradually, step by step, the situation became such that both courts and legislatures, as well as congress, were impelled to take action on this subject. One result of it all was the enactment by congress of the present rate law and the amendments thereto.

Under our plan of government, there is reserved to the states on the score of expediency alone, if for no other reason, the entire control of their internal affairs. But the federal government, though limited in the number of its objects to those which are national or interstate, is nevertheless supreme in those objects; and in cases of conflict or doubt the state government must yield, being thus far subordinate. This would result necessarily from the very nature of the two governments. But to avoid all shadow of doubt on so momentous a subject, this supremacy is declared by the federal constitution in these explicit terms:

“This constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

Stronger language than this would be difficult to formulate. It is clear and decisive. The lower must yield to the higher authority and power. The federal constitution goes still further. It enumerates, specifically, the objects to which the judicial power shall extend. And it is provided that,—

“The judicial power shall extend to all cases in law and equity arising under this constitution or the laws of the United States, etc.”

It would seem that this language confers the whole power of deciding these and other proper questions, in law or equity, upon the federal judiciary. And, of course if this be true, nothing is left to be exercised by any other tribunal, unless for special reasons and to meet special emergencies, some other tribunal is created by the act of congress.

It might also be here stated that in the first draft of this clause of the constitution as originally reported to the federal convention, the

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declaration of supremacy was confined to acts of congress. Reference to the constitution was entirely omitted, but was afterwards adopted by unanimous vote, in order that there might be no doubt as to the powers of the federal judiciary to expound the constitution as well as the laws of congress, in all cases of a judicial nature.

When, therefore, such a case is presented as grows out of, or involves, any provision of the federal constitution, or the laws of congress, it falls exclusively within the jurisdiction of the federal court, or of that tribunal which has been especially created to meet the particular emergency. And this without reference to the parties. The jurisdiction thereby becomes either original, exclusive, concurrent or appellate, dependent upon the provisions of the act in that regard.

Each state is therefore entirely sovereign within its territorial limits and is also subordinate to the federal government. No law of Ohio is, or could be, enforceable in relation to interstate commerce. The courts of Ohio have no jurisdiction in such matters and cannot control freight rates affecting interstate traffic. *Ashley v. Ryan*, 49 Ohio St. 504 [31 N. E. Rep. 721]; affirmed, *Ashley v. Ryan*, 8 O. F. D. 215 [153 U. S. 436; 38 L. Ed. 773]; *Perry v. Torrence*, 8 Ohio 521, 523.

The inability of the separate states to deal with such transactions as are involved in this controversy made it necessary for congress to enact the so-called rate law and the amendments thereto, and in doing so it fixed the remedy for such violations as occur thereunder.

If the rates complained of were such as affected and grew out of shipping contracts to be performed entirely within the boundaries of Ohio, there is no question but what the courts of Ohio, as well as the railroad commission of Ohio, would have jurisdiction in such cases; and the interstate commerce commission would not have jurisdiction thereof. *Interstate Com. Com. v. Railway*, 10 O. F. D. 179 [77 Fed. Rep. 942].

Special provisions have been made by the general assembly of Ohio for controversies of this character. Act 98 O. L. 542, passed April 2, 1906 (Lan. Rev. Stat. 5269a; B. 244-11), and kindred sections, create such a railroad commission and define its powers, as well as define certain duties of a public nature that shall be performed by the railroad companies. *Zanesville v. Fannan*, 53 Ohio St. 605 [42 N. E. Rep. 703; 53 Am. St. Rep. 664], Syl. Par. 2.

If upon investigation by the state commission, the rate or rates or any regulation, practice or service complained of, shall be found to be unreasonable or unjustly discriminatory, or the service shall be found to be inadequate, the commission has the power to grant relief; and in that event, if its orders are not complied with, it may compel compliance

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by proceedings in mandamus, injunction, or by other proper civil proceedings.

It is further provided by the statutes of Ohio, notably by act 88 O. L. 429 (Lan. Rev. Stat. 5400; B. 3373-1) that the courts may grant relief in cases where railroad companies do not secure and extend to all shippers the same and equal opportunities and facilities for receiving and shipping freight.

One of the most recent cases of this kind considered by the Supreme Court of Ohio, decided April 14, 1908, is that of the *Toledo & O. C. Ry. v. Wren*, 78 Ohio St. 137 [84 N. E. Rep. 785].

So that it will be conceded that these rate matters are cognizable in proper cases either by the state railroad commission or by the state courts, because of the scope and character of our statutes on the subject of railroad shipments.

It is undisputed that the rates complained of in the case before us involve freight rates on interstate traffic, and, therefore, it follows that this action cannot be disposed of without considering the law of congress relating to that subject.

Whether it is the duty of the complaining shipper to file his grievances with the interstate commerce commission in the first instance, or file them in the federal court, becomes an important matter, but we need not determine it here, for it has already been considered by the United States Supreme Court. In the case of *Texas & Pac. Ry. v. Oil Co.* 204 U. S. 426 [27 Sup. Ct. Rep. 350; 51 L. Ed. 553], that court has given its interpretation of the language of Sec. 9 of the interstate commerce act, 24 Stat. at L. 382, Chap. 104. That was a suit originally instituted in a state court. The oil company claimed that the charges made by the railway company were exorbitant. The railway company contended that the reasonableness of the posted rates could not be contested in the state court, and the trial court sustained the position of the railway company, but the Texas court of final resort reversed that holding and gave judgment. The Supreme Court of the United States set aside this judgment. Section 9 of the act reads, in part, as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf, for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

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With special reference as to whether the complaint should be made before the interstate commerce commission the court say:

"When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation but an indissoluble unity between the provisions for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination could inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that the shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of the court and jury, and thus such shipper receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. * * * If without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created * * * if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power ex-

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isted in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance, and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

These quotations go to show that as to the reasonableness or unreasonableness of freight rates on interstate commerce, the interstate commerce commission has original jurisdiction pertaining to the same, and is the proper tribunal with which to lodge complaints of the character involved in the case now under consideration, particularly when the schedule complained of is an established tariff, legally filed, published and posted as required by the federal statute, as is conceded in this case.

There is another section of the interstate commerce act (25 Stat. at L. 862, Sec. 22) which bears upon this subject and should not be overlooked. It is therein provided:

"Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In construing this section, however, Justice White says:

"This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself * * * The proposition that if the statute be construed as depriving courts generally, of the power to grant redress, upon the basis that the established rate was unreasonable, without previous action by the commission, great harm will result, is only an argument of convenience, which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it."

In the concluding part of the opinion of Justice White, the following language is used:

"Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the interstate commerce commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have

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said, that the court below erred in the construction which it gave to the act to regulate commerce."

Again, it is said in the case of *United States v. Railway*, 122 Fed. Rep. 544, 546:

"But in that case, the interstate commerce commission had never granted a hearing, or made an order, in the matters involved. The commission is the tribunal instituted by the government to inquire primarily into the fact as to whether discrimination exists. * * * Until an inquiry is there made, and a finding and order had, the jurisdiction of a court of equity may not be invoked, because for a court to take hold, at that primary point in a case, would be to transfer the jurisdiction of the interstate commerce commission—the jurisdiction to first inquire into the facts—to a court of equity. In practical application, it would abolish the interstate commerce commission and devolve upon a Master in Chancery the preliminary inquiry into the facts."

Another case bearing upon this controversy is that of *Kinnavey v. Railway*, 81 Fed. Rep. 803, the court there using this language:

"The rates so published and on file are the only legal rates the carrier can charge, and any variation from them subjects the carrier to the penalties of the act. * * * These rates, as published and filed, must therefore be, *prima facie*, the criterion in determining whether a given charge is reasonable or not. If the charge conforms to the schedule of rates, it is therefore, *prima facie*, reasonable. Under such circumstances, therefore, to state a cause of action based upon Sec. 1 of the act, there must be an averment either that the carrier failed to publish its schedule of rates, or that it charged in excess of the rates as published and then in force, and in either case that the charge as made was unreasonable, or an averment of other facts sufficient to do away with the *prima facie* effect of the schedule rate."

And still another adjudication might be cited:

In the case of *Texas & Pacific Ry. v. Oil Mills*, 204 U. S. 449 [27 Sup. Ct. Rep. 358; 51 L. Ed. 562], the United States Supreme Court held that interstate freight rates are established when a schedule thereof is filed by a carrier with the commission and copies are furnished by the railway company to its freight offices, although said rates may not be "posted" as required by Sec. 6 of the act.

In view of these decisions to which we have called attention, and in view of the allegations of the petition, the court holds that the restraining order *pendente lite* heretofore granted by another branch of this court, and made, as is frequently done, upon *ex parte* hearing and without argument or citation of authorities, should be dissolved.

The court is further influenced to grant the motion by the well established rule that the burden of establishing the right to a perpetual

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injunction is upon the party asking for it. It is true that the court is not here asked directly to make the present restraining order of perpetual binding force upon the railway company, but is asked to continue it in force until some one else, foreign to this case, and in some other jurisdiction, obtains in the future, in a similar controversy, a decision by the interstate commerce commission. This would entail a delay which the defendant vigorously objects to, and which the court is not warranted in favoring. For, as is often said in different adjudications, "the court will grant a perpetual injunction only when a clear right thereto is shown." *Spangler v. Cleveland*, 43 Ohio St. 526 [3 N. E. Rep. 365]. This being a case, therefore, of which the court cannot entertain jurisdiction, the motion is granted, and the action dismissed.

DEEDS—DESCENT AND DISTRIBUTION.

[Licking Common Pleas, April Term, 1908.]

JOHN W. KING ET AL. v. JOSHUA S. ANDERSON.

ANCESTRAL CHARACTER OF PROPERTY NOT CHANGED BY GIVING RELEASES IN THE FORM OF WARRANTY DEEDS THEREBY.

The ancestral character of property is not lost by the fact that, in making partition thereof, the sons of decedent gave releases in the form of deeds of general warranty, the sole purpose of which being to effect an assignment to each of the parties; hence, upon the death of one of such sons without issue, his widow takes a life estate only, the fee going to his brothers and sisters under Sec. 4158 Rev. Stat.

[Syllabus approved by the court.]

APPEAL from Licking probate court.

J. M. Swartz and R. W. Howard, for plaintiffs.

J. R. Davies, for defendant.

SEWARD, J. (Orally).

This case comes into this court on appeal from the probate court. The suit is brought seeking partition of several tracts of real estate, but the only tract in controversy here is the fifth tract described in the petition. The question involved is whether that was ancestral property in the decedent or property that came to him by purchase.

John W. Anderson, the father of Joshua S. and John R. Anderson, died intestate, seized of about 140 acres of land, including the fifth parcel in the petition described. He left a widow, and two sons, Joshua S. and John R. Forty-one and twenty one-hundredths acres were set off to the widow for her dower. It was set off to her and conveyed to her by their joint deed. April 4, 1883, they divided the balance, 104 26-100 acres, each deeding to the other 52 13-100 acres by different de-

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scriptions, there being 52 13-100 acres in each deed. The consideration named in the deeds was \$1,400. In the deed from Joshua S. to John R., the one-half is recited. In the other, he conveys the whole; and these deeds contain covenants of general warranty.

Subsequent to these conveyances, in 1898, John R. died, leaving a widow, but no children. The widow of John R. conveyed the land of which he died seized to one Phillippi, under the assumption that the land came to John by purchase and, therefore, she inherited under the statute in that respect.

The defendant, Joshua, claims that the land of which his brother died seized was ancestral property, and that the land passed to him as heir of John subject to the widow's life estate. The plaintiffs claim that the real estate was not ancestral property, and that, upon the death of John the same vested in his widow in fee.

The claim is made by the plaintiffs' counsel that this deed from Joshua S. to John R., contains covenants of general warranty, and works an estoppel upon Joshua to claim any interest in the real estate. Joshua claims that it was ancestral property in John R., who died, and upon John's death the title passed to the widow for life and remainder to him, subject to the widow's life estate. And that is so, if it is ancestral property.

The deeds were made on the same date—the fourth of April. I do not remember the year, and it is not material. These deeds passed between John R. and Joshua S., and the deed from the boys to their mother for the dower interest.

The court does not think the question of the dower interest cuts any figure in relation to the controversy between the parties now before the court. It is claimed, by virtue of the fact that these deeds contained covenants of general warranty, that Joshua is estopped from claiming title, he having made a warranty deed to John R.; and that any subsequent title that John R. might acquire, if the title were defective, that Joshua would be estopped from claiming any interest in it.

It is held in *Carter v. Day*, 59 Ohio St. 96 [51 N. E. Rep. 967; 69 Am. St. 757], that it does not make any difference, if deeds are passed by tenants in common, in order to convey to each tenant his particular portion of the land which they held in common before, that it does not affect the question of the title to the property, being ancestral property. That it is only where it came by purchase.

There are three ways of acquiring title to real estate in Ohio—by descent, by deed of gift, and by purchase. If this property went by descent, it was ancestral property in these boys. If it went to either of them by purchase from the other, then the ancestral quality of the property was destroyed, and it became property by purchase, and would

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go to the widow upon the death of her husband without leaving any heir to inherit it; and if it was ancestral property, it would go to her for life, and then to the brothers of the whole or half blood. This is a brother of the whole blood. *Carter v. Day, supra*, holds:

"1. The line of descent is not broken by partition of an estate theretofore held in common, whether the partition be made in a legal proceeding, or by the interchange of mutual releases. In either case the title of each parcener in the share set off to him in severalty remains the same as that by which his undivided interest in the land was held.

"2. Where the estate in common came by descent, devise, or deed of gift, the parcel allotted to a parcener who dies seized of the same descends according to the provisions of Section 4158 of the Revised Statutes.

"3. When partition is made by mutual releases, they should be read and construed together, in the light of the circumstances attending their execution; and it is competent to show that their only purpose was to accomplish the partition, and no other consideration passed between the parties, though a pecuniary consideration be expressed in the deeds."

It looks to the court as though that covers the case. Also page 101:

"A partition of land by action, the authorities maintain, creates no new title to the shares set off to the parcnens in severalty. While its effect is to locate the share of each in his allotted parcel of the land, and extinguish his interest in all the others, the title by which he holds his divided share is the same as that by which his undivided interest in the estate in common was held."

The opinion is quite lengthy, and the court will not go into it further.

It is held in *Freeman v. Allen*, 17 Ohio St. 527, that where land came to tenants in common, and partition proceedings were commenced by some of the tenants against others, and some of the tenants elected to take the property at the appraised value, that the interest that the tenant took at the appraised value came by purchase; and that the interest that he received by descent was ancestral. That is a case where there were nine children, and one-ninth came by descent to each. Two of the parcnens elected to take at the appraisement, and it was held by the Supreme Court that, in so far as the election to take at the appraisement, that portion of it came by purchase, but the other was ancestral property.

It is claimed that this warranty deed cuts some figure in the case; and it would if the title came by purchase, possibly; but if it was simply a scheme to give to each parcener his particular portion of the land which they held in common, then it would not cut any figure, as the

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court views it, and it would not estop the grantor from claiming title by descent from his brother.

I am cited to a decision by Judge Ranney, *White v. Brocaw*, 14 Ohio St. 339. The second branch of the syllabus is as follows:

“Where in a deed, in the ordinary form of bargain, sale and release, and which purports only to convey to the grantees ‘all the estate, right, title, interest, claim and demand, both in law and equity,’ of the grantors, ‘of, in and to the said premises, and every part thereof,’ containing no recital or other description whatever, of any particular interest owned or possessed by the grantors, or intended to be conveyed, a covenant is inserted by which the grantors agree to ‘warrant and forever defend the said premises against all persons claiming or to claim, by, from or under them, their heirs or assigns,’ such covenant is only coextensive with the grant, and binds only the vested interests of the grantors in the property at the time, and does not extend to an after-acquired title.”

And the court held in this case that that does not work an estoppel on the part of the grantor as to any future title. I read from page 343:

“But the court is also of the opinion, that the covenant works no such consequence as is supposed,”—that is, an estoppel—“and that it is not of the slightest consequence whether it is in or out of the deed. The deed is in the ordinary form of bargain, sale and release, and purports only to convey to the grantees, ‘all the estate, right, title, interest, claim and demand, both in law and equity, of the said Michael V. Brocaw and Magdalene, his wife, of, in and to, the said premises, and every part thereof.’ It contains no recital, or other description whatever, of any particular interest owned or possessed by the grantors, or intended to be conveyed.”

But what were these parties attempting to do? They were attempting to divide up this land and each get his particular portion of it; Joshua to get his 52 13-100 acres out of the whole piece, and John to get 52 13-100 acres out of the whole piece—the 145 acres, and to give the widow a sufficient portion which would satisfy her dower interest. That is what they were attempting to do. They put in each deed a consideration of \$1,400; each deed was made on the same date; and the court thinks that these parties were simply attempting to do, and were doing, at that time, what they had a right to do; to assign to each his particular portion in the entire tract of land, and that this property is ancestral property, and, upon the death of John R., without issue, the title, in fee simple, passed to his brother, Joshua S.; and there may be a decree accordingly.

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INDICTMENTS AND INFORMATIONS.

[Hamilton Common Pleas, April Term, 1908.]

STATE V. GEORGE H. STAPELY ET AL.**INDICTMENT HELD NOT INVALIDATED BY USING WORDS ADDITIONAL TO CONSTITUTIONAL PHRASE.**

A second count in an indictment, concluding "against the peace and dignity of the state of Ohio, being a further description of the same transaction complained of in the first count of this indictment," is not rendered invalid by the use of the additional words following the constitutional phraseology; but they may be disregarded as mere surplusage.

[For other cases in point, see 5 Cyc. Dig., "Indictments and Informations," § 59.—Ed.]

[Syllabus approved by the court.]

MOTION to quash.

H. L. Rulison, Pros. Atty., for plaintiff.

William Littleford and **A. P. Foster**, for defendant.

HUNT, J.

The indictment in this case contains two counts: The first count concludes with the words "against the peace and dignity of the state of Ohio." The second count concludes with the same words except that there is added thereto the words "being a further description of the same transaction complained of in the first count of this indictment."

Article 4, Sec. 20 of the constitution of Ohio adopted in 1851, provides that all indictments shall conclude "against the peace and dignity of the state of Ohio."

It is claimed that the indictment does not conclude as provided by the constitution, and is therefore a void indictment.

Article 3, Sec. 12 of the constitution of Ohio adopted in 1802, after providing that all prosecutions shall be in the name and by the authority of the state of Ohio, provides that "all indictments shall conclude against the peace and dignity of the same."

Similar provisions were adopted in the constitutions of some of the other American states.

Under the common law there were various terminations of indictments, depending on the time and character of the crime charged. Upon the use of the proper termination, the validity of the indictment depended.

Among other undistinguishable distinctions, the use of the singular instead of the plural, in referring to the statutes, was sufficient to invalidate an indictment. The manifest object of the constitutional provisions above referred to, was to wipe out all such controversies by pro-

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viding a sufficient and uniform conclusion to the allegations of fact constituting the charge.

It is conceded under the authorities cited by both the state and the defendant, that changes in the phraseology of the prescribed conclusion, not in any way changing the sense, of the prescribed constitutional phrase, do not invalidate the indictment.

An examination of the phrase prescribed by the constitution of 1802, shows that the exact words of such phrase were not intended to be used. The use of the word "same" in such constitution, while appropriate for the expression of the idea when used in connection with the rest of the section, would not be appropriate for the expression of the same idea in the actual drawing of an indictment wherein the words "state of Ohio" would ordinarily be substituted.

During that period in the growth of English criminal law, when more than one hundred crimes, many of them trivial, were punishable by death, and little or no distinction was made between the criminal who was a menace to society and the mere unfortunate, and even as between adults and children, both judge and jury availed themselves of many almost absurd technical distinctions and fictions in mitigating the severity of the law.

Almost all of this legal lore has now become obsolete and valuable only in studying the evolution of law, and for the purpose of viewing existing law from a proper perspective.

While there has been, and should be, no relaxation in the enforcement of every reasonable right of the accused, or in the potency and effect of that presumption of his innocence, until his conviction by due process of law, or in the rules as to the certainty required in the definition of the specific crime with which he is charged, the punishment thereof, and in the steps necessary to be taken, and the evidence necessary to be produced before the accused can be found guilty, nevertheless, certain rules have been established in no respect prejudicial to the accused, and for the purpose of eliminating immaterial issues. One of these rules is as to surplusage in indictments, to wit, that an immaterial statement which in no way limits, enlarges, makes ambiguous, or negatives the allegations necessary to constitute a charge of crime, may be disregarded as surplusage, and if the indictment is otherwise good, such surplusage will not make it void.

The rule is conceded, but it is claimed by counsel for the defendant, that by reason of the constitutional provision above mentioned, it is not applicable to the conclusion of an indictment, for the reason that the constitution itself prescribes the conclusion.

The case of *Haun v. State*, 13 Tex. App. 383-386 [44 Am. Rep. 706], a decision of an intermediate court, clearly supports such claim, but

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the cases of *State v. Schloss*, 93 Mo. 361 [6 S. W. Rep. 244], and *State v. Powers*, 59 S. C. 200-213 [37 S. E. Rep. 690], in all of which similar constitutional provisions were construed, are directly to the contrary.

The other cases cited by counsel, although read with interest and profit as showing the trend of judicial thought, under analogous circumstances, are not so decisive of the question now at issue.

In the absence of any decision upon such question, by any court in Ohio, and of any suggestion of possible prejudice to the accused in this case, the application of the rule disregarding surplusage seems, in this case, to be in accordance with modern tendencies, and in the interest of a speedy administration of justice.

The motion to quash, therefore, will be overruled.

COUNTIES—HIGHWAYS.

[Hamilton Common Pleas, March 19, 1908.]

JAMES W. DURNELL, ADMR. v. OHIO TRACTION CO. ET AL.

COUNTY COMMISSIONERS' LIABILITY FOR DAMAGES FOR ACCIDENT DUE TO BAD CONDITION OF COUNTY ROAD.

As Sec. 845 Rev. Stat., prescribing the general powers, duties and liabilities of county commissioners, is in derogation of the common law and should be strictly construed, a petition filed under this section and asking for damages against county commissioners, because of an accident growing out of the unsafe condition of a public highway, should clearly allege that the road in question is a state or county road; it is not sufficient to designate it as a public highway or turnpike.

[Syllabus approved by the court.]

HEARD on demurrer to petition.

Kelly & Follett, for plaintiff.

L. A. Ireton, W. R. Collins, W. M. Schoenle and G. T. Poor, for Hamilton county.

George Warrington, for Ohio Traction Co.

BROMWELL, J.

This is an action brought by the administrator of Lawrence Connor against the Ohio Traction Company and the board of county commissioners of Hamilton county for injuries and subsequent death of said Connor by reason of alleged negligence on the part of defendants in not keeping a certain road designated as the Cincinnati, Springfield & Carthage turnpike in proper repair, and to this petition a demurrer has been filed on behalf of the county commissioners for the reason that said petition contains a misjoinder of parties defendant. In argument it is claimed by the county solicitor that the county commissioners are not liable for any negligence on their part in failing to maintain and keep in repair such roads as that described in the petition.

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The petition, among other things, alleges that said Cincinnati, Springfield & Carthage Pike is a public highway * * * and is under the care, maintenance and control of the said board of county commissioners; * * * that at all times the defendants had the care, management and control of said turnpike and the tracks of said traction line, and it was the duty of said defendants and each of them to keep the roadbed of said turnpike in good repair, convenient and safe for public travel; that the rails of said traction line were laid in and upon the roadbed of said turnpike and were a part and it was the duty of said defendants and each of them to keep and maintain said tracks on a level with the road-bed of said turnpike so that the same would be crossed back and forth with convenience and safety by vehicles of all descriptions; * * * that for many months prior to the date of the alleged accident and on that day the roadbed of said turnpike at the place where the accident occurred had been washed by rains and worn by travel, until the bed or level of said turnpike was six inches lower than the top of the rails, thereby rendering said turnpike unfit and dangerous to cross and recross; * * * that in spite of the fact that the defendants had notice of the condition of said roadbed and tracks they failed, neglected and refused to repair and keep and maintain said roadbed and the tracks of said traction line in a condition safe for public travel, and carelessly and negligently permitted said roadbed to be washed away and worn by travel and remain in the dangerous condition referred to.

It then sets out the manner in which the accident occurred to plaintiff's intestate, who was riding on the rear step of an ice delivery wagon which was being driven on said turnpike; that in attempting to cross over the rails of said traction line the wheel of the wagon was caught by the rails and one of them was broken off, and as a result the wagon fell upon the decedent, causing injuries which resulted in his death.

A similar demurrer to that filed by the county commissioners has also been filed on behalf of the Ohio Traction Company.

The traction company made no argument upon the demurrer filed by it, but the county solicitor, in support of the demurrer of the county commissioners, takes the position that roads of the kind referred to in the petition are not under such control of the county commissioners as to render such commissioners liable for injuries growing out of their negligence in failing to keep said roads in repair, and adopting the reasoning of the lower courts in the case of *Smith v. Williams Co. (Comrs.)* 29 O. C. C. 610, further claims that said commissioners have no statutory duty to keep such roads in repair.

Prior to the amendment of Sec. 845 Rev. Stat. (91 O. L. 142),

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there was no right of action against a county or its commissioners for damages sustained by the failure to keep a road or bridge in repair, the wording of the statute at that time being:

"The board of commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judicature * * * and to ask, demand and receive, by suit or otherwise, any real estate or interest therein, whether the same is legal or equitable, belonging to their county, or any sum or sums of money or other property due to such county."

The amendment referred to introduced immediately after the word "judicature" above, the following:

"And of bringing, maintaining and defending all suits, either in law or in equity, involving an injury to any public, state or county road, bridge or ditch, drain or water course established by such board in its county, and for the prevention of injury to the same *and any such board of county commissioners shall be liable in its official capacity for any damages received by reason of its negligence or carelessness in keeping any such road or bridge in proper repair.*"

Reference to this amendment as found in 91 O. L. 142, will show no punctuation between the word "public" and the word "state" on the fifth line, while the statute as printed in the last editions of Revised Statutes shows a comma between those two words. If the former absence of punctuation is correct, the section would seem to be limited to state or county roads, etc., while, if the punctuation as found in Sec. 845 Rev. Stat. is adopted, it might give a broader meaning to the word "public" than if it is merely used to qualify the words which follow, and making it a class by itself.

The courts, so far as they have considered this section, seem to regard the language as intended to apply only to the two classes of roads, state and county.

As Sec. 845 Rev. Stat. creates a new statutory right of action not authorized at common law, it should, like all other statutes in derogation of the common law, be construed strictly. Applying this rule of strict construction, the petition in this case should have clearly alleged that the road upon which the accident occurred was a state or county road. It is not sufficient to designate it as a public highway, or as a turnpike, for city streets are public highways, and it will not be contended that the county commissioners would be responsible for keeping them in repair, or be liable for accidents growing out of their unsafe condition; and turnpikes are not necessarily state or county roads, and in many instances are not especially where tolls are collected on said turnpike.

The allegation that said pike is under the care, maintenance and

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control of the board of county commissioners does not sufficiently state that it comes within either of the classes of roads referred to in this section.

But even if the language of the petition would justify the assumption that said turnpike was a county road, we would feel ourselves bound by the decision of the Supreme Court in *Smith v. Williams Co.* (Comrs.) 74 Ohio St. 434, affirming without report, *Smith v. Williams Co.* (Comrs.), *supra*.

"Section 845 Rev. Stat. does not impose upon county commissioners the duty of keeping unimproved county highways in repair. Therefore, such commissioners are not officially liable for injuries sustained by a person, by reason of the conveyance in which she was riding, sliding into a deep rut or hole. And on such a showing a directed verdict for defendants is not error."

The court, on page 612, uses this language in reference to the road involved in that case:

"That this was a county road seems to be admitted, but it is urged that no duty is imposed upon the county commissioners by any statute, of making such repairs as seems to have been necessary here under the circumstances of this case."

The court then goes on to say on the same page, referring to the commissioners:

"It is their duty in some cases to repair roads; as, for instance, where, by freshet or inundation, the road has been partially or wholly swept away so as to render it impassable, there it is the duty of the commissioners to repair the road. That is not claimed to be the case here, but it is claimed that this condition existed in the road for several months as alleged in the petition.

"Now, we have examined, as far as we know, all of the statutes bearing upon this question, and we have been unable to find any statute expressly imposing this duty upon the county commissioners in a case of this kind. I will not undertake to review all the statutes bearing on roads and bridges as they are numerous and it would be impossible to review them in this opinion, but it will be observed that this statute only makes the county liable for the negligence of the commissioners. It does not, as in some of the bridge statutes, make the county liable for damages in case of failure to repair and keep in repair bridges as expressed in some of the bridge statutes. Negligence is the failure to use ordinary care. It is the failure to perform a duty imposed upon one either by statute or by common law * * * and in order to make the county commissioners liable for defects in county roads under this statute, it must be shown that they were negligent in some respects."

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“This statute should receive a reasonably strict construction, for to impose upon the county the liability for a defect in any road would impose a tremendous liability regardless of the fact as to whether or not the board of county commissioners are actually negligent or not.
* * *

“Whether the doctrine of constructive notices would prevail or not, we are uncertain; that is, to hold the county liable on the ground that it had been out of repair for some time. There is no claim in this case that there was any actual notice to the commissioners of the condition of this road.”

Through the courtesy of the county solicitor we have been furnished copies of the printed record and briefs of the counsel in the case from which we have last cited, and while in that case the court refused the motion to dismiss before the taking of evidence, and decided the case upon a motion after the evidence was in, the reasoning of the court would seem to warrant us in disposing of the question on the motion now pending.

We therefore sustain the demurrer of the county commissioners.

Sickles v. State.

CRIMINAL LAW—DRUGS AND DRUGGISTS.

[Hamilton Common Pleas Court, May, 1908.]

SICKLES v. STATE.

ANDREWS v. STATE.

MINSTERKETTER v. STATE.

RHEIN v. STATE.

1. WAIVER OF JURY IN WRITING ESSENTIAL TO PUNISHMENT BY MAGISTRATE.

Unless one accused of violating Sec. 4405 Rev. Stat. as to retailing drugs, etc., waive trial by jury in writing, the magistrate has no authority to punish, but can only bind the prisoner over to the proper court, as provided by Sec. 7147 Rev. Stat.

2. AVERTMENT THAT ACCUSED, IN PROSECUTION FOR OFFERING AND EXPOSING DRUGS, ETC., FOR SALE, IS PROPRIETOR OR MANAGER HELD NECESSARY.

Section 4405 Rev. Stat., governing the sale of drugs, poisons, etc., embraces two separate offenses: (1) Prohibiting a "proprietor or manager," not a legally registered pharmacist, to open or conduct a pharmacy without having in charge a legally registered pharmacist; and (2) prohibiting any person not a legally registered pharmacist, or a legally registered assistant pharmacist under a legally registered pharmacist, to compound, dispense or sell any drug, poison, etc. Hence, affidavits charging an offering and exposing for sale, etc., but failing to aver that defendants were either proprietors or managers, are defective under the former charge; and, not averring a compounding, dispensing or selling, state no violation of the latter charge.

3. STRICT PROOF NOT REQUIRED IN PRELIMINARY EXAMINATION BY MAGISTRATE.

Under Sec. 7147 Rev. Stat. a magistrate, being only an examining officer, strict proof is not required, it being only necessary to show that an offense has been committed, and that there was probable cause to believe the accused guilty.

[Syllabus approved by the court.]

ERROR to magistrate's court.

Hoffman, Bode & LeBlond and Millard Tyree, for plaintiffs in error.

C. F. Williams, for defendant in error.

PFLEGER, J.

The four above entitled cases taken upon error from the magistrate's court were prosecutions under Sec. 4405 Rev. Stat. governing the sale of drugs by registered pharmacists. Three questions are involved: (1) Was the evidence sufficient to convict the defendants? (2) Was there a sufficient allegation in the affidavits constituting the offense charged? And (3) Did the magistrate have authority to impose the sentence?

(1) Taking the last assignment of error first, the magistrate tried the accused without a jury or a waiver of a jury as if he had final jurisdiction, and punished the defendants by inflicting a fine of \$20. Sec. 7147 Rev. Stat. provides that when there is no plea of guilty and if the offense charged be a misdemeanor and the accused does not waive a jury in writing, the magistrate can only inquire into the complaint,

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and if there is probable cause to believe the prisoner guilty, he shall bind the accused over to the proper court and take a recognizance for his appearance in the other court; otherwise he shall be discharged from custody.

There appears to be no special provision to try the accused, unless it be by virtue of Sec. 3718 applicable to the adulteration or deception in the sale of dairy products or any other foods, drugs and medicines, which provides for impaneling a jury from the common pleas jury wheel in the event a jury be not waived.

In the cases at bar the jury was not waived either in writing or orally. The records do not disclose whether a jury was waived or not. In *Simmons v. State*, 75 Ohio St. 346 [79 N. E. Rep. 555], it was determined that such waiver must clearly and affirmatively appear upon the record before the magistrate can hear the complaint and render final judgment. The justice, therefore, had not the authority under the circumstances to hear and determine the cases and render final judgment by fine. This was erroneous.

(2) There are at least two separate offenses charged in Sec. 4405 Rev. Stat. One is that it is unlawful for a "proprietor or manager" not a legally registered pharmacist to open or conduct a pharmacy without having in his employ and placed in charge a legally registered pharmacist under the laws of this state. The other is that it is unlawful for any person not a legally registered pharmacist to compound, dispense or sell any drug unless he be a legally registered assistant employed under a legally registered pharmacist.

Each and all of the four affidavits charge the defendants with unlawfully opening and conducting a retail drug store, offering and exposing for sale divers drugs, to wit, "tincture of iodine or opiate," the defendant not then and there being a legally registered pharmacist under the laws of Ohio, nor having in his employ such a legally registered pharmacist. The affidavits were insufficient in failing to state that the defendants were either proprietors or managers under the first charge. If it was intended to cover the second charge, then the gravamen of the offense in compounding, dispensing or selling such drug or poison (not in offering or exposing the same for sale) was entirely omitted. The affidavits in all four cases were, therefore, defective in these respects.

(3) On the ground that the evidence offered was insufficient to convict, it may be stated that the justice in these cases being merely an examining magistrate, it was only necessary to show that the offense had been committed and that there was probable cause to believe the prisoner guilty. Strict proof, as in courts having final jurisdiction, is not required.

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In the Sickles case it was shown that the defendant, who was not a registered pharmacist or assistant, was in sole charge of the drug store and sold to the prosecuting witness tincture of iodine. In none of the cases making such a charge except the one against Andrews was there proof that tincture of iodine was a drug or poison. In the Sickles case, had the prosecution elected to try the case on the second charge under the statute, it would have furnished sufficient evidence to bind the defendant over; assuming, of course, that it was unnecessary in a preliminary hearing to produce proof that the article sold was a drug or poison.

In the Andrews case tincture of iodine was shown to be a chemical or poison, but the accused was charged with selling *nux vomica*. The state, however, elected to proceed against the accused as one who opens or conducts a drug store without a registered pharmacist instead of on the charge of being an unregistered pharmacist who sold a drug or poison, and under which latter offense it would have been insufficient to ultimately convict of the offense charged in the affidavit. It was unnecessary to prove the sale of the drug in the first offense and if the testimony that the defendant was in charge of the store was sufficient to establish that the defendant was the "proprietor or manager," the proof would have been complete.

In the Minsterketter case the charge was selling *nux vomica*, and the state elected to proceed on the charge that he was offering and exposing for sale *nux vomica*. This charge was insufficient in that it failed to allege either compounding, dispensing or selling. The proof established that the accused sold tincture of arnica and not *nux vomica*. The proof also failed to show that it was a drug, poison, chemical or pharmaceutical preparation. In the Rhein case the affidavit charged the defendant with exposing and offering for sale tincture of opia, and the state elected to proceed on the charge of opening and conducting a drug store. The evidence established the fact that the accused was a relief clerk who was not registered in accordance with the laws of the state and that he was in charge of the store and that the proprietor was temporarily absent in the cellar. It does not appear that the accused sold any drug nor that the proprietor, who was about the store, to wit, in the cellar, was not himself a registered pharmacist and would put up the prescriptions or make the sales.

The proof in this case is incomplete in establishing even a case sufficient to bind the accused over.

The proceedings in all four cases are, therefore, reversed, and inasmuch as all of the charges are defective in the particulars mentioned, the defendants will be discharged in all these cases.

Superior Court of Cincinnati.

MUNICIPAL CORPORATIONS—PEDDLERS.

[Superior Court of Cincinnati, 1908.]

UNITED CIGAR STORES CO. v. ERNST VON BARGEN, AUD., ET AL.

1. TAXPAYING FOREIGN CORPORATIONS MAY ENJOIN MUNICIPALITIES.

A foreign corporation that is a taxpayer, has the same authority, under Sec. 1778 (Lan. 3281; B. 1538-668) Rev. Stat., as a resident corporation or individual to bring an action to enjoin a municipality from abuse of its corporate powers.

2. MUNICIPALITIES CANNOT LICENSE PERMANENT PEDDLER STANDS.

Municipal corporations, under the general licensing powers conferred by Sec. 2669 (Lan. 3950; B. 1536-327) Rev. Stat., cannot by ordinance permit a peddler, under the guise of a license, to occupy a portion of the inside of the sidewalk by a structure built against the wall of a building for the permanent use and purpose of vending wares; the term "peddlers" signifies an ambulatory person and cannot be construed or extended to include a merchant with a fixed location.

3. OBSTRUCTION OF STREET BY PEDDLER'S STAND NOT OBTAINED BY PRESCRIPTION OR ABUTTER'S CONSENT.

The fact that such a peddler's stand has been maintained for a period of seventeen years does not create any right in the sidewalk, nor relieve the municipality from the duty of clearing the sidewalk of such obstruction; nor does the fact that the structure is maintained under an agreement with the property owner create any right for such occupancy of the sidewalk as against the rights of the general public.

[Syllabus approved by the court.]

HEARD on demurrer.

Jacob Shroder, for plaintiff.

Goeffrey Goldsmith, assistant solicitor, for the city.

Gideon Wilson, for Joseph Massa.

SPIEGEL, J.

The plaintiff, the United Cigar Stores Company, files a petition alleging that it is a corporation incorporated under the laws of New Jersey, and that it institutes this suit on behalf of the city of Cincinnati, the city solicitor having failed to do so, although requested thereto, and complains that the council of said city passed an ordinance on June 2, 1905, authorizing peddlers from stands to sell fruits, candies, groceries and other articles upon payment of a license fee of \$15 annually; that in pursuance of said ordinance, which was duly approved by the mayor, said auditor, Ernst Von Bargen, issued such license to the defendant, Joseph Massa, who thereupon took possession of a permanent stand at the northwest corner of Fifth and Walnut streets and extending on the west side of Walnut street, from which he sells fruits, etc.; that the issuance of such license to use and occupy said space with a permanent stand is an abuse of the corporate power conferred by law on said city, and that said ordinance is invalid.

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Plaintiff further says that said northwest corner of Fifth and Walnut streets and the west side of Walnut street for more than one hundred feet north of said corner is used by a large number of lines of the street railway system as one of its *termini*, and that said sidewalk is in consequence constantly made use of as a passageway during the day and evening by a great number of passengers of said lines, and that said stand extends northward on Walnut street about twelve feet, and extends over the sidewalk about three feet; that this is a gross abuse of the corporate power of the city from which the damage is irreparable, and for which there is no adequate remedy at law.

Plaintiff prays for an injunction against the defendants restraining the granting and continuance of licenses under said ordinance to a "peddler from stand," and especially the continuance of a license to Mr. Massa, restraining him from occupying said stand. There is attached to said petition a copy of the license issued to him.

To this petition the city and its auditor file a joint answer admitting the issuance of a peddler's stand license to Massa, denying, however, that said license assigned to him the northwest corner of Fifth and Walnut streets and twelve feet on Walnut street, or any other locality whatsoever, but admits that said stand has for seventeen years been occupied in said locality for said purpose, and finally denies that such stand is in any way a nuisance or impediment to travel. The answer further alleges that the occupancy of the inside strip of said sidewalk is by virtue of a lease subsisting between the defendant, Joseph Massa, and the Owl Drug Company, the owner of the property on which said stand abuts. The defendants finally deny any abuse of corporate power on the part of the city, or that said license is invalid.

The defendant, Joseph Massa, interposes a demurrer to the petition on three grounds, namely, that the United Cigar Stores Company, a corporation under the laws of New Jersey, has not the legal capacity to institute this proceeding; that there is a defect of parties defendant, and that the petition does not state facts sufficient to constitute a cause of action.

This decision is upon the demurrer.

The first ground for demurrer is based upon the legal incapacity of the plaintiff, a foreign corporation, to institute this proceeding. Section 1778 (Lan. 3281; B. 1536-668) Rev. Stat., provides that any taxpayer may institute such suit, the city solicitor upon request failing to do so. No distinction is made by law in the filing of such suit, as to whether the plaintiff is a person or a corporation, and whether such corporation is resident or foreign. All that is required is that the party instituting the suit shall be a taxpayer. *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374 [49 N. E. Rep. 335], is in point as to the question

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of corporations bringing such suit, and I cannot see any distinction between a foreign and a resident corporation as long as such corporation is, in the words of the statute, a taxpayer. The question of interstate comity does not arise in this case.

The second proposition, that there is a defect of parties defendant, is not urged by demurrant, and an examination of the pleadings does not disclose a defect of parties defendant.

I come now to the third ground, that the petition does not state facts sufficient to constitute a cause of action. The petitioner alleges that the city has been guilty of an abuse of its corporate authority by issuing licenses to peddlers from stands in accordance with the ordinance already cited. It is axiomatic American law that a municipality has only those powers that are granted to it by the state. Section 2669 (Lan. 3950; B. 1536-327) Rev. Stat., authorizes municipal councils to license peddlers. This is a generic term. It is certainly opposed to permanency, such permanency as a structure on a sidewalk built against the house used for the purpose of vending wares. The action of him receiving this license, in locating in a structure on the sidewalk and using it for a permanent sales room, the city authorities permitting it, stamps this "peddler's stand" license with its true quality, although the same does not specifically assign any locality to its recipient. The word peddler has a well defined meaning. It means an ambulatory person, not a merchant with a fixed location, and council has no authority to add to or widen this meaning, unless directly authorized by the state so to do. *Mays v. Cincinnati*, 1 Ohio St. 269.

The fact that the stand, as alleged in the city's answer, has been in that locality for seventeen years does not create any rights against the city. *Elster v. Springfield*, 49 Ohio St. 82 [30 N. E. Rep. 82]. It is the city's duty to keep its sidewalks and streets free from obstruction, and not to license individuals to occupy them and obstruct public travel.

Arguments relative to markets, etc., are not analogous nor in point, for the Ohio statutes expressly distinguished market places from streets, and permanent stands in markets are authorized by statute. It is the policy of our law to keep our public places free from obstruction, and this duty is cast upon the municipal authorities. They cannot evade it, much less destroy it, by illegally enlarging the terms of the statute by the passage of an ordinance. It is true the city alleges in its answer that it does not authorize the use of the sidewalk or any part thereof for private business purposes, that this license designates no permanent place, and if so occupied that is done by private arrangement between the owner of the premises and the peddler from the stand, but this is a mere subterfuge. The municipal authorities instead of keeping the sidewalk free from obstruction stand idly by and see it thus occupied

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for seventeen years. The owner of the property has no greater right in the sidewalk in front of his premises than the general public. He has a right to have it free from obstruction the same as the people, so that anybody may freely enter his premises. The general public has the right to have the sidewalk in front of his premises free from obstruction for the general purpose of travel. The rights and duties of both the owner of the premises and the general public in said sidewalk are reciprocal. The owner possesses but an easement, and so does the general public. *Branahan v. Hotel Co.* 39 Ohio St. 333 [48 Am. Rep. 457].

The demurrer is overruled.

MUNICIPAL CORPORATIONS—NEGLIGENCE.

[Superior Court of Cincinnati, General Term, April 19, 1908.]

Hoffheimer, Shattuck and Spiegel, JJ.

WILLIAM HENRY BELL v. CINCINNATI (CITY).**1. MUNICIPALITY OPERATING QUARRY WITH WORKHOUSE LABOR ACTS IN A GOVERNMENTAL AND NOT MINISTERIAL CAPACITY.**

A municipal corporation operating a stone quarry by workhouse prisoners and selling the product thereof, thereby making some incidental profit to maintain its workhouse and receiving some remuneration for the labor of a majority of its prisoners, is not conducting a private corporate enterprise for profit upon which an action for negligence can be predicated, but it is exercising a delegated governmental function as agent of the state in upholding the public peace and guarding safety of its people.

[For other cases in point, see "Municipal Corporations," §§ 2633-2686.—Ed.]

2. ORDINANCE AUTHORIZING EMPLOYMENT OF WORKHOUSE PRISONERS OUTSIDE PRESUMED ENACTED.

Public officers will be presumed to do as the law and their duty requires. Hence, where a city authorizes the employment of workhouse prisoners outside of such institution it will be presumed that an ordinance permitting such employment was enacted in conformity with the provisions of Rev. Stat. 2100 (Lan. 3431; B. 1536-370).

3. WHETHER CITY ACTS IN MINISTERIAL OR GOVERNMENTAL CAPACITY HELD A QUESTION OF LAW AND NOT OF FACT.

The issue in a negligence case against a municipality being whether the city acted in a ministerial or governmental capacity, the evidence offered being uncontroverted, it becomes the duty of the court to pronounce the law upon the facts presented and it is not a question of fact for the jury.

4. BURDEN IS ON PLAINTIFF TO SHOW THAT MUNICIPALITY ACTS IN MINISTERIAL CAPACITY.

The burden of proof in an action against a municipality for negligence, in which plaintiff alleges that the defendant is engaged in a private enterprise for profit is upon the plaintiff to show that it acted in a ministerial capacity. Hence, a charge, submitting the question to the jury, imposing the burden upon the municipality to show by a preponderance of the evidence that it acted within its governmental function, is erroneous.

[Syllabus approved by the court.]

D. V. Sutphin, assistant city solicitor, for plaintiff in error.

C. W. Baker, for defendant in error.

Superior Court of Cincinnati.

SPIEGEL, J.

Plaintiff in error, the city of Cincinnati, assigns numerous errors, upon each of which it asks a reversal of the judgment rendered in special term upon the aforesaid cause. The principal assignments upon which many errors are predicated are the overruling of the demurrers to the original and amended petitions, and the overruling of the motions both at the close of plaintiff's testimony and of all the testimony, to instruct a verdict for the defendant, and for a new trial, all upon the ground that the city was engaged in the exercise of a governmental state function and not performing any ministerial duty imposed upon the city in its corporate capacity.

To the original petition the city itself filed an answer, but by leave of court withdrew it and entered a demurrer based upon the ground already stated.

The rule in Ohio regarding the distinction between the exercise of governmental and purely municipal functions by a city has been laid down by Judge Gholson in *Western College v. Cleveland*, 12 Ohio St. 375, 377, as follows:

"It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state—discharging duties incumbent on the state; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done, or omitted, is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

Under the state function of protecting the peace, our courts, in common with the courts of every other state where this question has arisen, have included the taking care by the city of its prisoners by means of prisons, jails and workhouses, as well as by the employment of policemen and workhouse guards, who under the law of our state are invested with the powers of policemen. Revised Statutes 2105 (Lan. 3436). Thus, in *Rose v. Toledo*, 24 O. C. C. 540, the circuit court held that the city was not liable to a prisoner confined in a workhouse for injuries to his health. The court said, page 543:

"The city, in the performance of such duties, acts, not for the individual, but for the public, acts in a governmental capacity for the benefit of the people. The workhouse is constructed and maintained not for the benefit and pleasure of those who may be so un-

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fortunate as to be committed to it and confined therein, but it is constructed and maintained under the laws of the state for a public purpose, as one of the institutions of the government for the imprisonment of wrongdoers and they are confined therein for correction and punishment—as the penitentiary at Columbus is constructed and maintained for similar purposes.”

Also, *Green v. Muskingum Co. (Comrs.)* 13-23 O. C. C. 43, 44:

“It cannot be doubted that the power conferred on municipalities, to preserve the peace and protect persons and property by the arrest of offenders and their commitment and detention in jails and workhouses, is of a public or governmental nature, in which the sovereign state exercises its functions through the agency of the municipality. In such case, the nonliability of the municipality rests upon the same reason as does that of the sovereign exercising like powers.”

Without citing the numerous authorities upon this subject from other states, I shall only quote the latest writer upon this topic, who has covered the authorities in his work, 3 Abbott, *Munic. Corp. Par.* 966, wherein he lays down the rule as follows:

“The preservation of the public peace is another purely governmental function in respect to the character of which there can be no dispute. The same rule of nonliability, therefore, applies, and public corporations will not be held liable for injuries, either to their officers while in the performance of their duties, or to others who may be injured by them, nor for the defective condition of jails, courthouses, prisons or buildings used in the administration of justice, or their appliances.”

Believing this to be the law, the court below erred in not sustaining the demurrer to the original petition. The suit against the city, as stated in said petition, was based upon the assumption that the city was acting in its corporate capacity as a municipality and not as an agent of the state in the exercise of the latter's governmental functions.

The petition alleges that the plaintiff was injured by the explosion of certain caps contained in a box which he was trying to open, he being a workhouse guard at the quarry near the workhouse, in which certain prisoners were working at quarrying stone and occasionally blasting for that purpose; that he had no knowledge or experience in handling said caps and other explosives, nor that he appreciated or realized the dangers connected therewith, and that his ignorance and inexperience was well known to the defendant city and its officers superior to and in command of the plaintiff. The petition was demurrable upon the ground already stated, but also under the law covering the relations of master and servant, because it did not allege one of the essential allegations necessary to fixing liability on the master, namely, that the city had knowledge, actual or constructive,

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of the risk plaintiff was running, and did not instruct him in regard thereto.

The city, upon the overruling of the demurrer to said original petition, to which it excepted, filed an answer admitting its corporate character and employment of the plaintiff, and the injuries which he received, but denying every other statement therein contained, and further answering it alleged as a matter of fact that in thus employing its prisoners in said quarry it was engaged in a governmental function of the state, and that plaintiff was one of its officers employed therein; and further that plaintiff was guilty of contributory negligence which directly caused his injuries.

The case went to trial in February, 1907, and during its progress counsel for plaintiff obtained leave of court, the city excepting, to amend his petition by further alleging that said city and its servants superior in authority to plaintiff, whose orders he was bound to obey, knew that he was entirely ignorant of the danger of working with said dangerous explosives, and that neither the city nor its aforesaid officers ever warned or instructed him as to any of said dangers, although they well knew them, having had, a long time previously, charge of said quarry, cutting and excavating, by blasting and other means, stone from the same, which the city sold to dealers and consumers for profit, and had been so doing for a long time before.

The city again demurred, but the court overruled said demurrer, and we think rightly so, as this petition, besides being invulnerable in this statement of facts necessary to the recovery under the law of master and servant, alleges furthermore that the city was conducting a quarry for profit in its corporate capacity and not as an agent of the state in upholding the public peace. Upon the overruling of this demurrer to the amended petition, the city filed a reply denying all allegations of the amended petition. At the close of plaintiff's testimony, and again at the close of all the testimony, the city filed motions asking the court to arrest the case from the jury and to direct a verdict for the defendant, both of which motions were overruled by the court. Special charges were given and special charges were refused, on all of which error is predicated by the city, and the court charged the jury generally, leaving it to them to find as a matter of fact whether the city acted in a governmental capacity or in its corporate capacity for its own private ends, to which, as well as to the charge generally, the city excepted. The jury returned a verdict for \$12,500 for plaintiff. The city filed a motion for a new trial, which was overruled by the court, and judgment was entered upon the verdict.

An examination of the record becomes necessary to determine whether the court erred in overruling the motion to direct a verdict

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for the plaintiff, in leaving the question in what capacity the city acted to the jury, and in overruling the motion for a new trial.

Plaintiff in his amended petition alleges that the city, for a long time previous, had charge of said quarry, cutting, excavating by blasting and other means stone from the same, which the city sold to dealers and consumers for profit, and had been so doing for a long time before.

To determine this question we must find from the record whether the city conducted a private corporate enterprise for profit, or acted as agent for the state, guarding the peace and safety of its people.

We fully agree with counsel for plaintiff when he lays down the rule that "the act is ministerial when a thing is done by the city as a private proprietor and for profit." What does the record disclose? Neither the amended petition alleges, nor does any evidence show as claimed in plaintiff's brief, that the city owned the said quarry. The only testimony upon this point was that of Mr. Ruehrwein, superintendent of the workhouse, who stated that the quarry had been worked about seven years, always by prisoners, not in winter but in summer when the weather was favorable (record, page 248), and that of the plaintiff who stated (record, page 15), "the average was forty-five to eighty-five and ninety prisoners; of course, every day was not alike."

Upon the question of working this quarry for profit as a private enterprise of the city in its corporate capacity, the following is the only testimony introduced (record, page 437):

"Mr. Bell, at this quarry, from the time you went there on the fifth of July, I wish you would tell these gentlemen what it was that they got out of that quarry? A. They quarried rock, and the building rock was sold to the various builders, and the small rock was hauled down to the prison sheds and the prisoners that was unable to walk to the hill, such as cripples, one-legged fellows and one-armed fellows—they were broken—they hauled the rock down there for them.

"Q. Broken up into what? A. Broken up into four different sizes, very small size, a little larger—there were four different sizes of them. The large size, regular macadam, was sold to people for driveways, and the smaller lots were—I don't know what they could use them for—driveways."

Upon this state of facts the jury found the city was engaged in an enterprise for purely municipal profit, and not in the exercise of a governmental function. This certainly is error. The mere incidental profits the city received from the sale of a few of the rocks quarried does not make it a municipal enterprise. The city in the maintenance of its workhouse received a remuneration for the labor of a majority of its prisoners detained therein, and yet no one will claim that thereby the workhouse becomes a private municipal enterprise,

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and is not one of the means whereby the city conserves the peace of its inhabitants.

The rule is laid down in *Curran v. Boston*, 151 Mass. 505 [24 N. E. Rep. 781; 8 L. R. A. 243; 21 Am. St. Rep. 465], wherein the syllabus reads:

"The city of Boston is not liable for personal injuries occasioned to an inmate of its house of industry by the negligence of the officers and servants employed by the board of directors of public institutions to administer its affairs, although at the time such inmate is engaged in labor from which the city derives profit."

The court say, page 508:

"By the statute authorizing the erection and maintenance of workhouses by a city, a mode of performing a strictly public duty is provided for which cannot be of any pecuniary advantage to the cities or towns instituting them. No such case is presented as exists where a city has undertaken to build particular works, as waterworks, sewers, etc., and where a city acts as an agency to carry on an enterprise to some extent commercial in its character, for the purpose of furnishing conveniences and benefits to such as choose to pay for them. The element of consideration then comes in, and in such cases it is usually held that a liability exists on the part of the city for an injury to an individual through negligence in building or maintaining such works."

On page 509:

"Nor do we perceive any reason why the city should be held responsible because some revenue is derived from the labor of the inmates. It is required that these inmates should be kept at work, by the statute, but the institution is not conducted with a view to any pecuniary profit. It is not suggested that the expenses of maintaining the workhouse are met by what is derived from the labor of the inmates, or that any profit above them is made. Even if the entire expense is not met by taxation, by reason of the profit thus derived, such profit is purely incidental. The object and purpose of the workhouse, and the conduct of it, are not thus shown to be of the nature of a business. It only appears that, as a public institution, it is managed in a judicious and economical manner."

Counsel for plaintiff in his argument before the general term and in his brief raises the question that the city is nevertheless liable because the law (Rev. Stat. 2100; Lan. 3431; B. 1536-370), authorizing the employment of prisoners outside of the workhouse, makes this dependent upon the passage of a city ordinance authorizing such employment; that the defendant, the city, has not offered proof of such ordinance.

A careful examination of the record, however, discloses the fact

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that this question was not raised at all below, neither in the pleadings nor in the trial by evidence. We must, therefore, be governed by the rule of law which makes it a presumption of fact that public officers do as the law and their duty require them (Lawson, Presump. Ev. 67), in accordance with the rule laid down by the Supreme Court of the United States in *Bank of United States v. Dandridge*, 25 U. S. (12 Wheat.) 64, 70 [6 L. Ed. 552], and by Chief Justice Thurman of our state in *Coombs v. Lane*, 4 Ohio St. 112, where the syllabus reads:

"In respect to official acts, the law will presume all to have been rightfully done, unless the circumstances of the case overturn this presumption; and consequently, acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter.

"Facts presumed are as effectually established as facts proved, so long as the presumption remains un rebutted."

Besides, it may be said, in passing, that such an ordinance does exist. Coppock & Hertenstein's Ordinances of Cincinnati 344, Sec. 44.

Did the court, therefore, err in overruling the motion to take the case from the jury at the close of plaintiff's, as well as of all the testimony, and in directing the jury that it was their duty to determine whether the city acted in a governmental or municipal capacity? Our answer must be yes to all these questions.

We have cited all the evidence introduced purporting to maintain the claim of plaintiff that the city was engaged in a private municipal enterprise for profit. The evidence upon this question was not controverted. Upon such a state of facts it became the duty of the trial court to pronounce the law, and not leave to the jury the finding of the facts and the law upon them. Under our view of the law, the court should have granted all these motions. But granting, for argument's sake, that the court rightfully charged the jury to find whether the act of the city was governmental or ministerial, then the charge is fatally defective in not laying down any rule to guide the jury in their determination of the quality of said act.

It was not enough to charge the jury to find in what capacity the city acted, but it was also the duty of the court to lay down to them a rule of law under which the jury could determine whether the act was ministerial or governmental. And the said charge was also erroneous in directing the jury that the burden rested on the city to show by preponderance of the evidence that the act was governmental, for the burden rested throughout upon the plaintiff to prove all the allegations of his petition necessary to hold the city liable, and among these allegations one of the most important was that the city acted in its private corporate capacity and was not performing a delegated state function.

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Error has also been assigned by the city for the refusal of the court to give certain special charges requested by it, but we do not find any error therein.

After a careful examination of the evidence and the law, realizing fully the hardships of this case, but believing the judgment to be both against the law and the evidence, the prayer for a reversal of said judgment must be granted and final judgment must be entered for the plaintiff in error. Whatever relief the plaintiff is entitled to must be given by the legislature.

Shattuck and Hoffheimer, JJ., concur.

BENEFICIAL ASSOCIATIONS.

[Superior Court of Cincinnati, Special Term, August 15, 1907.]

*CHRISTINA HUNT V. SUPREME LODGE OF ANCIENT ORDER OF UNITED WORKMEN ET AL.

LIEN OF BENEFICIARY ON ADJUDICATED CLAIM.

Adjudication of claims by the duly authorized trustees of a fraternal organization, and delivery to beneficiary of order on the treasurer to pay, is a setting apart of the fund for this purpose; and presentation of order to treasurer and his refusal to pay establishes a lien on the funds which equity will recognize and enforce as against a subsequently appointed receiver or assignee of the organization.

[Syllabus by the court.]

J. T. Harrison and Spangenberg & Spangenberg, for plaintiff.

A. C. Shattuck, for receivers and Wertman.

HOSEA, J.

This cause having been substantially reheard, on the motion of the receivers to be made parties, and upon the motion of the plaintiff for

*Affirmed general term, Oct. 21, 1907; without report, 79 Ohio St. 431.

Approved and followed by circuit court of Franklin county in *State ex rel. v. Grand Lodge*, December, 1907.

DUSTIN, J.

We are of the opinion that the issuing of the warrant in question by the proper authorities of the A. O. U. W. was the setting aside of the amount named for the claimant, Mrs. Koehler.

It was an order upon itself, duly certified, and needing no acceptance.

The action of an executive officer could not invalidate it nor render it non-effective. It was equivalent to what is known in banking as a cashier's check; and its legal effect is the same as if the money had been wrapped, labelled and set aside as belonging to the party named thereon.

Hence we think the authorities cited by counsel for the receiver with reference to checks and orders do not apply, and that *Judge Hosea of the superior court of Cincinnati, Ohio, in the case of Hunt v. Supreme Lodge A. O. U. W., took the proper view.*

Decree accordingly.

Wilson and Sullivan, JJ., concur.

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judgment on the pleadings, and upon default as to the grand lodge for answer, has been carefully reconsidered; but I find no reason to change materially the views expressed in the former opinion. .

The sole question here is whether the act of the grand lodge in adjudicating the claim of plaintiff in her favor and issuing a warrant or order on its treasurer (called the grand receiver) for payment is such a disposition of its funds as will prevail against the claims of general creditors through receivers subsequently appointed in quo warranto proceedings by the state.

It is claimed by the receivers that the order on the treasurer is in the nature of a check upon a bank and does not operate to give the plaintiff a lien in equity upon the funds; but this I do not regard as a legally tenable contention, nor are the authorities cited applicable.

The acts of the company here are rather in the nature of an actual payment, thwarted only by the tortious refusal of the treasurer to perform his duty. The treasurer, however, is simply a servant of the company—the custodian of the funds of the grand lodge. The actual control and disposition of the funds were vested in a board or trustees who were his superior officers and whose orders he was bound to obey, having no discretion in respect thereto. The giving of the warrant or order on the treasurer consequent upon the adjudication of the claim by the proper authorities, was therefore a complete sequestration of funds covered by the warrant and already within the legal control of the board or trustees.

Under ordinary circumstances the remedy would be a suit at law against the company, which is primarily responsible to the party wronged, for the tort of the servant in respect of the duties of his employment; and an action over by the company against its servant for the default. A well established ground of equitable action, however, is to avoid a multiplicity of suits. In this case the treasurer has submitted himself to the jurisdiction by his answer; and, as appears from the admissions of his counsel, he still retains in his possession, under the injunction heretofore issued by this court, the funds in dispute. Moreover, the answer of the treasurer admits the presentation of the warrant, the demand of payment and his refusal—all prior to the ouster proceedings by virtue of which the receivers came into existence.

I see no reason, therefore, why this court should not go forward and complete its jurisdictional proceedings, and, indeed, it is its duty to do so.

The allegation of the petition is, that the adjudication of plaintiff's claim and the issuing to him of a warrant upon the treasurer for its payment was an equitable assignment of the funds specified in the warrant. The default for answer of the grand lodge admits this to be true, and the answer of the treasurer admits the facts upon which it is necessarily

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true in law. This entire proceeding, therefore, is in effect the enforcement of the lien upon the fund so set apart to the plaintiff; or, considered in the aspect of a remedy by way of money judgment against the company for a tort of the servant in refusing to pay, may be regarded as in the nature of a proceeding in aid of execution, where, to avoid a multiplicity of suits, the court may reach out to the individual who has the money in possession wrongfully. The treasurer is not in a position to set up any defense in behalf of the company and interposes none in behalf of himself.

The primary facts, therefore, being undisputed, a decree may be entered as upon the pleadings embracing a judgment against the grand lodge for the amount specified in the warrant with interest and costs, and an order directing the treasurer, Wertman, to pay to the clerk of this court or to a receiver to be named the amount of said judgment and costs; and the cause is retained and continued for further hearing on the motion of the receivers to be made parties when the funds shall be in court for distribution.

ATTORNEY AND CLIENT—BEAL LAW—CRIMINAL LAW.

[Clinton Common Pleas, October 12, 1908.]

ELI GILLIAM V. STATE.

1. ATTORNEY OTHER THAN PROSECUTING ATTORNEY MAY PROSECUTE VIOLATIONS OF BEAL LAW.

An attorney other than the prosecuting attorney may appear for the prosecution for violation of the Beal law, and may file a reply to a plea in bar.

[For other cases in point, see 1 Cyc. Dig., "Attorney and Client," § 484 *et seq.*—Ed.]

2. RECORD OF DISMISSAL OF CRIMINAL PROSECUTION BASED ON DEFECTIVE AFFIDAVIT NOT BAR TO SUBSEQUENT PROSECUTION FOR SAME ACT.

An affidavit charging the commission of two or more things in the disjunctive is bad for uncertainty and the record of the "dismissal" of a case predicated upon such an affidavit is not a bar to a subsequent prosecution.

[For other cases in point, see 3 Cyc. Dig., "Criminal Law," §§ 230 *et seq.*—Ed.]

[Syllabus approved by the court.]

ERROR to mayor's court.

On the sixth day of September, 1908, an affidavit was filed before H. G. Bates, mayor of Blanchester, Clinton county, Ohio, charging among other things that the defendant "did on the thirteenth day of June, 1908, at the village of Blanchester, unlawfully furnish, sell or give away intoxicating liquor to be used as a beverage, to one G. R. Smith, and that the same was then and there prohibited and unlaw-

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ful, etc." Upon this affidavit the defendant was arrested and upon being arraigned plead "not guilty" and case set for trial September 9, at which time the following entry was made by the mayor:

"On application of attorneys for the prosecution, this case is dismissed without prejudice and the defendant released."

The same day another affidavit was filed against the defendant charging him with the commission of a crime in the same language as in the original affidavit, except the acts charged to have been committed were charged in the conjunctive instead of the disjunctive.

To this second affidavit the defendant interposed his plea in bar, pleading the former discharge in bar of a prosecution on the second affidavit; to this plea a reply was filed, under oath, by Melville Hayes, as counsel for the state, controverting the facts set up in said plea in bar; then defendant moved to strike this plea in bar from the files for the reason, that Mr. Hayes was not the prosecuting attorney of Clinton county, Ohio. Mr. Hayes admitted that he was not the prosecuting attorney of said county, nor of any other county, but was employed by the village of Blanchester to appear for the state of Ohio in the prosecution of this case. Thereupon the court overruled said motion and the defendant excepted.

Thereupon the case came on for hearing on the issue arising on said plea in bar and the reply thereto, and the defendant offered in evidence a transcript of the former case, which, upon objection by the state, was ruled out, to which the defendant excepted. The plea in bar was determined adversely to the defendant. A trial was had resulting in the conviction of the defendant.

J. B. Brant, for plaintiff.

Melville Hayes and E. L. Hayes, for defendant.

WEST, J.

This cause comes before this court upon an application of the defendant for leave to file a petition in error. The first ground of error assigned is the refusal of the court to strike from the files the reply filed to the defendant's plea in bar, on the ground that such reply can only be filed by the prosecuting attorney of the proper county.

The general duties of a prosecuting attorney are prescribed by Sec. 1273 Rev. Stat. as follows:

"The prosecuting attorney shall prosecute on behalf of the state, all complaints, suits and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within the county, in the probate court, common pleas court and circuit court." Nowhere does the statute require the prosecuting attorney to appear before and prosecute actions in any other tribunal and especially in magistrates' courts.

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The statute, as it now stands, is practically the same as it has been since the act found in 31 O. L. 13. This act came under review in the case of *Smith v. Portage Co. (Comrs.)* 9 Ohio 25. Judge Wood delivering the opinion of the court held, page 27:

"It thus appears that the duty of the county attorney is confined to the Supreme Court and the court of common pleas, and his appearance in an inferior court is a *mere voluntary act*."

Since then courts of probate have been created by the constitution of 1851 and the circuit court created, but do not in any way affect the questions and the duties of the prosecuting attorney, which now extend to those courts.

The case of *Smith v. Portage Co. (Comrs.) supra*, has been followed and approved in the case of *Cincinnati, S. & C. Ry. v. Lee*, 37 Ohio St. 479. Judge Okey delivering the opinion of the court said, page 480:

"It is the duty of the prosecuting attorney to conduct the prosecution of offenders in the court of common pleas; but in *Smith v. Portage Co. (Comrs.)* 9 Ohio 25, it is said that he is not bound to appear before a justice of the peace or mayor, in a criminal case. The law remains the same to the present day. But, in fact, that officer, in many cases, appears voluntarily in an examining court, and conducts the prosecution there. He does the same thing sometimes at the request of a citizen, without any expectation on his part to receive, or on the part of the citizen to pay, compensation for the services."

The mayors of villages have final jurisdiction to hear and determine prosecutions under the Beal law. Now, if the prosecuting attorney is not required to attend upon these courts and prosecute this class of cases, can it be claimed for a moment that thereby offenders ought to go unprosecuted, which would be the logical effect of the claim made by the defendant here? That such is not the law, I think, is clearly borne out by an examination of Sec. 20 of the act of February 23, 1906 (98 O. L. 18), which provides:

"Sec. 20. No petition in error shall be filed in any court to reverse any conviction for violation of any law prohibiting the sale of intoxicating liquors in any territory or district, or to reverse any judgment affirming such conviction except after leave granted by the reviewing court, and no such leave shall be granted except after good cause shown at a hearing of which counsel for the complainant in the original case shall have had actual and reasonable notice."

Now, it appears to this court that if the prosecuting attorney alone had the power to appear and prosecute, there would have been no necessity for the passage of the act in question. Why should notice be given to counsel for "complainant in the original case" unless such counsel had the power to appear and prosecute.

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I may, indeed, add that it has been almost the universal practice throughout the state of Ohio for private counsel to appear in the prosecution of cases before mayors and magistrates where those officers had final jurisdiction, as well as those in which they acted only as examining courts. It, therefore, logically follows, that if counsel may be employed other than the prosecuting attorney to prosecute this class of cases, he has power to perform any act necessary in the prosecution of a case, which would include the filing of such pleadings and taking such action as is necessary to dispose of the plea in bar.

The next error assigned is the refusal of the court to admit in evidence the transcript of the former case. The record shows that in the first case the affidavit charged the offense in this language, that the defendant "did furnish, sell or give away intoxicating liquor." Now, the question naturally arises, did this affidavit charge the defendant with the commission of either of said acts? The pleader in the first case evidently followed the rule that it is generally sufficient to charge the crime in the language of the statute, but he overlooked the fact that charging the commission of several acts in the disjunctive does not charge the defendant with the commission of either of them. Black, *Intoxicating Liquor*, Sec. 439, says, "or" is a dangerous word to use in an indictment.

The reason is, that it is extremely liable to make the statement of the offense uncertain. When its effect is to render it doubtful which of the two or more acts, articles or agencies is intended to be alleged, its use is fatal to the indictment. There is but one case in which it is safe to copy the disjunctive from the statute, and that is where "or" is used in the statute in the sense of "to wit," that is, where that which follows is merely descriptive or explanatory of that which precedes, so that the two are identical or equivalent. If the two things separated by this word are different things, the pleader must allege only one of them or use the conjunctive "and." Now, coming to the affidavit in question, these other several acts charged to have been committed by the defendant are charged in the disjunctive. Therefore, that affidavit was bad. These principles are amply illustrated by decisions dealing with our particular subject-matter. Thus, an indictment which alleges an unlawful sale of "spiruous or intoxicating liquor," or of "ardent or intoxicating liquor," or of "ale, beer or wine" following the language of the statute, is bad for uncertainty. *State v. Moran*, 40 Me. 129; *State v. Fairgrieve*, 29 Mo. App. 641; *Raisler v. State*, 55 Ala. 64.

Now, if the affidavit here was bad for uncertainty, advantage could have been taken even after a conviction, by a motion in arrest of judgment. Therefore, it seems to me, that under the first affidavit the defendant was never in jeopardy, because no conviction could be sus-

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tained upon that affidavit. It, therefore, necessarily follows, that the mayor did not err in ruling out the record of the first case.

Let us now recur again to Sec. 20 of the act of February 23, 1906, defining the duties of the courts in cases like this. That statute expressly provides, that no petition in error can be filed except upon application and upon good cause shown at a hearing. This statute is not merely directory, as I take it, but is mandatory to the extent that good cause must be shown before the court would be authorized to grant the leave.

I imagine that the reason for the passage of this statute is to prevent encumbering the records of the courts with cases without merit, but by far the greater and higher reason for the passage of that statute was to prevent the delays that usually follow in this class of cases whereby justice is practically defeated.

Therefore, looking over the whole record, I am unable to find that there exists good cause for the allowance of this application to file a petition in error. The application will, therefore, be denied.

CORPORATIONS—INJUNCTIONS.

[Superior Court of Cincinnati, Special Term, 1908.]

UNION PAINLESS DENTISTS CO. v. DON C. MULLENS ET AL.**CORPORATION ENGAGED IN PROFESSIONAL BUSINESS CANNOT ENJOIN COMPETITION THEREIN.**

A corporation cannot invoke the aid of equity to restrain unfair competition where the competition sought to be enjoined relates to business of a professional character which it is carrying on in its corporate name contrary to Secs. 3235 and 3238a Rev. Stat.

MOTION to dissolve temporary injunction.

D. F. Cash and F. J. Dorger, for plaintiff.

E. S. King and Patrick Gaynor, for defendant.

HOFFHEIMER, J.

Plaintiffs, the Union Painless Dentists Company, a corporation doing business as "Union Painless Dentists," seek to enjoin defendants from doing business as "United Painless Dentists."

The complainant is organized as a corporation under the laws of Ohio, and its corporate name is the Union Painless Dentists Company, and from statements made during the argument on this motion yesterday, it appears, substantially, that this company is authorized to manufacture and deal in dental goods and supplies and to do all kinds of dental work.

The defendants, it does not seem to be disputed, for the purposes of this motion I have assumed, are not engaged in the manufacture of dental goods or supplies, but are associated for the purpose simply of

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doing professional dental work. This assumption is not only warranted by the argument, but would seem to be justified by the adoption of the name "United Painless Dentists," just as may be said in respect of plaintiffs, who advertise under the name of "Union Painless Dentists." The use of the word "painless" makes it self-evident that professional dentistry is the character of business engaged in by both these parties.

Section 3235 Rev. Stat. expressly prohibits corporations organized pursuant to Ohio law "from carrying on professional business." And Sec. 3238a provides that "no corporation shall change its name to one already appropriated, or to one likely to mislead the public, nor * * * provide for a purpose which is unlawful." Section 3236 provides that corporations for profit, such as complainant is, shall begin with the word "the" and end with the word "company."

Now, plaintiffs are not seeking to enjoin the defendants from using the words "the Union Painless Dentists Company," but from using the words "United Painless Dentists" because, so it is alleged, plaintiff uses the words "Union Painless Dentists" in the prosecution of its said business.

By use of these words, the words "the" and "company" having been omitted, it can be readily seen that the public, in view of the strict requirement of the statute, is likely to be misled into the belief that it is dealing with individuals, or an association of individuals rather than with a corporation. But what is more important, the court cannot overlook the fact that plaintiffs, as a corporation, are actually engaged in doing that which is in contravention of positive statutory enactment. In other words, the statute referred to expressly prohibits a corporation from carrying on professional business. And yet here is a corporation which holds itself out to the public, tacitly at least, as having the right to engage in professional business, and it seeks relief in its corporate capacity against others who may be interfering with it in that activity.

The corporation in question is formed "to manufacture and deal in dental goods and supplies and to do all kinds of dental work." By the language of its charter, this corporation possesses only those attributes which the charter confers, or such as may be implied as essential to its existence. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518 [4 L. Ed. 629]; *Gallia Co. (Comrs.) v. Holcomb*, 7 Ohio (pt. 1) 232.

It would seem, from the language of the charter, that the powers of this corporation are fairly those of manufacturing dental goods and dental work. Certainly there is nothing in the language to warrant the corporation engaging in professional business. Nor is it necessary to imply such power to save the corporation.

On the other hand, by Sec. 3235 Rev. Stat. we have seen that cor-

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porations are strictly prohibited from carrying on professional business; and it would be a legal fraud, to say the least, for such a corporation to attempt to carry on professional business, either under its actual corporate name, or under a name likely to mislead the public into believing that it had the power to engage in such business.

Nor would it seem that the court is precluded from going into these matters, on the theory that to do so amounts to an attack on the corporate existence of plaintiff. That an inquiry of this character, namely, an inquiry into the unauthorized and fraudulent acts of those claiming under the charter, is not an effort to collaterally impeach the charter of the company. See *Bonham v. Taylor*, 10 Ohio 108; *Bartholomew v. Bentley*, 1 Ohio St. 37.

Such being the situation, what is the duty of the court? The plaintiff seeks to invoke the aid of equity as against the alleged "unfair competition" of defendants. The gist of the action, therefore, is not the protection of the plaintiff in any exclusive property right (as in trade-mark cases) so much as it is to prevent deception of the public. The plaintiff's property rights, if any it has, are only incidentally involved. And even in trade-mark cases, if the business of the proprietor is itself illegal, or if the trade-mark is a fraud on the public, no relief will be granted. 2 Pomeroy, Eq. Jurisp. (3 ed.) Sec. 934.

As then the doctrine against unfair competition is practically based on the notion of protection to the public, it would seem to me, in view of all that has been said, that to uphold the restraining order on the ground that the public is likely to be deceived by defendants, would be to directly countenance and encourage that which it is clear the law forbids. It would be tantamount to saying that the public must not be permitted to be deceived into patronizing the United Painless Dentists, but must be permitted to be deceived into continuing to patronize the plaintiffs disguised as Union Painless Dentists, who, as we have seen, have not only no legal right, but are expressly forbidden to carry on professional dental business, under the corporate name.

Nothing is better established in equity than this: One seeking relief from the fraud of others must himself be free from fraud. The equitable maxim exacts clean hands of him who comes into a court of equity.

As plaintiff admits its corporate existence, and indeed is suing for the relief asked in such capacity, and as it is self-evident that the "unfair competition" sought to be enjoined relates to business which plaintiff is carrying on in its corporate capacity contrary to law, hence illegal, the relief asked cannot be granted. See also, 6 Pomeroy, Eq. Jurisp. Sec. 582.

The motion to dissolve the temporary restraining order is accordingly granted.

Paper Co. v. Coal Co.

CONTRACTS—DAMAGES.

[Superior Court of Cincinnati, 1908.]

HINDE & DAUCH PAPER CO. v. WAINWRIGHT COAL CO.**1. DIMINISHED OUTPUT OF FACTORY DUE TO USE OF INFERIOR COAL NOT PROXIMATE RESULT OF BREACH OF CONTRACT TO FURNISH CERTAIN COAL.**

The measure of damages for breach of contract to furnish coal to a factory is the difference in price under the contract for the grade of coal designated therein and the prevailing price in the market, at the time, for the same grade of coal; it does not include loss from diminished output of the factory occasioned by the use of inferior coal because of the increased price of the same grade of coal on the market.

2. CLOSING FACTORY CAUSING LOSS HELD A PROXIMATE DAMAGE FROM BREACH OF CONTRACT TO FURNISH COAL.

The net loss to a manufacturer resulting from the failure of a coal company to give notice that deliveries of coal would cease, compelling the closing down of factory of purchaser, is a proximate damage from the breach of contract to furnish coal and is a proper matter for proof.

[Syllabus approved by the court.]

Harmon, Colsten, Goldsmith & Hoadly, for plaintiff.

King, Guerin & Ramsey and Cobb, Howard & Bailey, for defendant.

SPIEGEL, J.

Plaintiff alleges that it is engaged in the manufacture of paper, operating a factory in Delphos, Ohio; that it is the successor of a corporation of the same name whose rights, titles and interest it has acquired by succession and by assignment; that said corporation used large quantities of a good quality steam coal; that the most satisfactory coal it had hitherto procured was that mined and furnished by the defendant, and the defendant had for many years prior to April 1, 1902, mined and sold the product of its mine to plaintiff's predecessor for use in its factory at Delphos, and that defendant well knew the quality and character of the coal best suited to its needs; that on April 24, 1902, the defendant with such full and complete knowledge of the character of coal required and with special reference thereto, entered into a contract with plaintiff's predecessor to furnish from its mine at Wellston, Ohio, all the bituminous run of mine or nut and slack coal that might be required by said predecessor for consumption in its paper mill located at Delphos and not to be sold or diverted to other purposes.

Plaintiff, for its first count for damages, says that its predecessor duly complied with the contract and was at all times ready and willing and even offered to continue to perform its part of the agreement, but that the defendant after having delivered coal for a certain time wholly failed and refused to furnish further coal, although repeatedly requested to do so, whereupon plaintiff's predecessor was compelled to and did

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purchase coal in the open market at the best price obtainable in order to preserve its business and carry out the orders of its patrons and guard against great financial loss and damage, and that the excess of cost over the contract price of the coal so purchased was \$2,377.

For its second count for damages, plaintiff alleges that its predecessor did not buy coal of the same quality, after defendant's breach of contract, because the price was too exorbitant, which would have increased its damages greatly in excess of the coal purchased by it in open market; that by reason of the use of this cheaper coal, however, its output of paper was greatly decreased, to its damage in the sum of \$911.21.

For a third count for damages, plaintiff says that defendant failed to give plaintiff's predecessor notice of its intention not to deliver coal as ordered, and as a result thereof it had to close its factory for a period of two days, which was occasioned by lack of coal, whereby it suffered a loss of \$50.

To this petition the defendant, the Wainwright Coal Company, has filed a motion to strike from this petition both the second and third counts for damages.

The recovery of damages for breach of contract is governed in Ohio by the well-known rule laid down in *Hadley v. Bazendale* (9 Exc. 341):

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in the respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of it." See *Champion Ice Co. v. Iron Works Co.* 68 Ohio St. 229 [67 N. E. Rep. 486].

The rule which governs in torts, that damages must be proximate, also governs in contracts, with this distinction, that in contracts this is a matter of interpretation of the contract, and is, therefore, left to the court for decision, whereas in torts it is considered a matter of fact, and left for the jury's determination.

Are the damages claimed by the plaintiff proximate or direct, either as a natural consequence of the breach of the contract, or were they within the contemplation of both parties at the time the contract was entered into?

Plaintiff alleges in its second count for damages, that at the time of the breach of the contract it was impossible to obtain coal of the same quality furnished theretofore by defendant because of its exorbitant price, and if it had been bought by the plaintiff's predecessor it would have increased defendant's liability greatly beyond plaintiff's present

Paper Co. v. Coal Co.

claim for damages; that inferior and cheaper coal was, therefore, bought by it, whereby the output of the factory was diminished 2,139 pounds of paper per day below the output with defendant's coal, to plaintiff's damage in \$911.21. The damages thus claimed surely are not a natural consequence of the breach of the contract alleged. Plaintiff is entitled to the difference between the contract price and the market price of the same quality of coal which would have cost to purchase in open market at the time of the breach of the contract. That it bought inferior quality of coal where it could have obtained the same quality as defendant's coal and thereby its output was diminished, is not a natural consequence of the breach of the contract, nor can it be said that it was reasonably within the contemplation of both parties at the time the contract was entered into. Taking the allegations of the petition at its best, the motion of defendant to strike out this count for damages is therefore granted.

The third count for damages claimed by plaintiff alleges that by reason of defendant's breach of contract of which it received no notice, its predecessor had to close its factory for two days by reason of lack of coal, in consequence of which it suffered a loss of \$25 per day as the net profit in the operation of its factory. This I consider to be a proximate damage occasioned by the breach of the contract. It does not fall under the category of speculative profits. It is a matter to be proved by the plaintiff upon the trial of the cause. The motion of defendant to strike out this count for damages is therefore overruled.

An order may be taken accordingly.

ATTACHMENT—LANDLORD AND TENANT.

[Hamilton Common Pleas, February 20, 1908.]

HARRISON v. GREENHOW.

LIABILITY OF TENANT FOR RENT OF PREMISES AFTER VACATION BEFORE EXPIRATION OF TERM.

Where a dwelling, leased for the period of one year, is vacated by the tenant at the end of one month and remains vacant for two months, the claim of the landlord for rent during the two months is a claim for necessities for which an attachment will lie.

ERROR from justice of the peace.

Guido Gores, for plaintiff.

H. R. Weber, for defendant.

WOODMANSEE, J.

This cause is in this court upon error from a justice of the peace, and the only question to be determined is whether the justice erred in

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overruling a motion of the defendant to discharge the attachment that had been issued in the case.

Plaintiff's claim was for two months' rent for a dwelling, which upon final hearing the justice found to be due. The plaintiff had rented a house to the defendant for his use for one year. It was disclosed that the defendant vacated the premises at the end of the first month. It remained unoccupied for two months, and rent was claimed for this period. Defendant insists that the claim is not for necessities and for this reason that the attachment which seeks to hold 10 per cent of his wages should be dismissed.

When the property was rented the landlord had reason to rely for security for payment of his rent upon his right to attach a part of the wages that might become due to his tenant. To say that the defendant could avoid this proceeding by simply vacating the dwelling is hardly in keeping with the spirit and the purpose of the statute. This suit is not for damages because of a breach of contract, but for rent.

In the case of *Smith v. Getz*, 29 O. C. C. 216, the tenant moved out before the end of the month and resisted the attachment for anything owing for rent after he had vacated, because it was claimed not to be "for necessities." The house was not occupied, therefore anything but necessary for defendant and his family. The court held the attachment valid.

We do not undertake to say how long a tenant could thus be held for rent under a lease when he vacates the property, but surely two months is not an unreasonable period. When the tenant knows the landlord's rights in this regard it will not work a hardship to either.

If a tenant acquires a lease for a year, with the landlord relying upon his security thus given by the statute, he ought not to be allowed to escape its application.

Judgment affirmed. Attachment sustained.

Augustus v. Lynd.

SHERIFFS—JUDICIAL SALES—PUBLICATION.

[Lawrence Common Pleas, October 22, 1908.]

S. ELLA AUGUSTUS v. W. H. LYND ET AL.

1. REASONS FOR APPOINTMENT OF SPECIAL MASTER COMMISSIONER TO EFFECT JUDICIAL SALE SHOULD BE SET FORTH IN ORDER OF SALE.

Under Sec. 5399 Rev. Stat., the appointment of a special master commissioner for the sale of specific property, together with the special reason or reasons why the sale should not be made by the sheriff of the county, shall be embodied in and made part of the judgment, order or decree ordering the sale.

2. SHERIFF'S REFUSAL TO INSERT NOTICE OF SALE IN PARTICULAR NEWSPAPER HELD NOT GROUND FOR APPOINTMENT OF MASTER COMMISSIONER.

The refusal, by the sheriff, of a request of the judgment creditor to insert the notice of sale in a particular newspaper is not ground for the appointment of a special master commissioner to make the sale.

3. SHERIFF SELECTS NEWSPAPER FOR PUBLICATION OF NOTICE OF SALE.

The statute (Sec. 5393 Rev. Stat.) makes it the duty of the sheriff to give public notice of the time and place of sale in a newspaper; and he may select any paper he pleases, subject only to the statutory requirement that the paper so selected, be one printed and of general circulation in the county.

[Syllabus by the court.]

MOTION for special master commissioner.

J. O. Yates and T. A. Jenkins, for plaintiff.

A. R. Johnson, for defendant.

CORN, J.

This cause is now before the court upon a motion by plaintiff for the appointment of a special master commissioner to appraise, advertise and sell, as upon execution, the property described in the petition.

On April 24, 1908, the plaintiff filed a petition in ordinary form, seeking a money judgment against the defendants, and the foreclosure of a mortgage, upon the real estate described, given to secure the debt. The defendants made default, and at the present term Mr. Jenkins, one of the counsel for the plaintiff, asked and obtained a default judgment against the defendants for \$2,200, with interest, and an order of foreclosure and sale of the premises described; at the same time making W. Wilson Lynd a party defendant, and a summons was allowed to issue for him; the court's minutes made on the docket are these:

"Judgment for plaintiff for \$2,200 with interest; foreclosure and order of sale; W. Wilson Lynd made defendant; summons issued."

No journal entry of this judgment has been made except as to that portion making Dr. Lynd a party; by taking notice of the records of the court this judgment and order were taken on September 15, 1908,

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no mention being made at that time of a master commissioner; and so far as the court is advised it was then the intention that the sheriff should receive the order and make the sale in the ordinary way.

It appears that some differences arose between the plaintiff's counsel and sheriff as to what newspaper should make the publication of the notice of the sale, the attorneys claiming, and the sheriff denying, their right to designate the paper in which he should insert the notice of sale.

Thereupon, on September 29, 1908, upon the foregoing status of the case, the plaintiff's attorneys filed a motion for the appointment of a special commissioner to appraise, advertise and sell said premises, and for the following reasons:

1. That the sheriff of Lawrence county has unlawfully entered into an unlawful agreement with the Register Publishing Company of Ironton, Ohio, by virtue of which agreement the said sheriff has bound himself to place with the said Register Publishing Company for publication all of the publications, advertisements, legal notices, and other kindred business that comes through his hands by virtue of his office, thereby giving to the said Register Publishing Company a monopoly of the public printing of his office and enabling said company to charge unreasonable and illegal fees for said work.

2. By reason of said above agreement with the said Register Publishing Company, said company has charged unreasonable and illegal fees while the same services could have been procured from other publishing companies at a more reasonable rate.

3. The different attorneys at this bar, including the undersigned, have on numerous occasions, complained to the clerk and sheriff of the unreasonable and illegal charges made for publications by said Register Publishing Company, and have protested to the sheriff against his placing the publication of their clients in the hands of the said Register Publishing Company, but notwithstanding said complaints and protests the sheriff has placed, and still insists on placing all publications of his office with said publishing company, although said publishing company continued to charge unreasonable and illegal fees, notwithstanding the complaints and protests of the attorneys to the great prejudice and against the interest of parties to proceedings in the court.

4. That the sheriff of Lawrence county insists that the publications in the above entitled cause must be given to the Register Publishing Company, over the protests of the attorneys for the plaintiff in the case, and when the publications can be had from other publishing companies at a more reasonable rate.

This motion is verified by Mr. Yates, one of the attorneys.

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The sheriff appears by counsel, and though filing no answer or denial, the matter is heard as though a denial of all the allegations had been entered.

If a master commissioner or special commissioner can be appointed, it must be appointed by virtue of Sec. 5399 Rev. Stat.; this section provides that real property may be conveyed by master commissioner or special master only in two cases:

1. "When by order or judgment in an action or proceeding a party is ordered to convey such property to another, and he neglects or refuses to comply with the order or judgment, and the master is directed to convey on failure of the party to comply with the order." Well, that is clearly not applicable to this case.

2. "When specific real property is sold by a master under an order or judgment of the court."

But the section further provides:

"No court within this state shall make or issue an order to any master commissioner for the sale of any real estate, unless there exists some special reason or reasons why the sale of said real estate should not be made by the sheriff of the county where said decree or order shall be made, which said reason or reasons, if the court shall find any such to exist, shall be embodied by said court in and made part of its judgment, order or decree ordering such sale."

Now the court made its judgment and decree ordering this sale fourteen days before the motion for the special master was filed or the question raised; the court, therefore, could not and did not embody the appointment of the special commissioner and the special reason, or reasons, if any existed, for such appointment, and why the sheriff should not make the sale, in its judgment ordering the sale.

In my judgment, then, this motion comes too late. The fact that no entry of this judgment had been made on the journal makes no difference, for such record is made for the purpose of preserving the evidence of what was actually transacted, *Mitchell v. Eyster*, 7 Ohio (pt. 1) 257; so that when the record is made showing correctly what was transacted, it will show that the judgment and order of sale did not embody the appointment of a special master and the special reason or reasons therefor, as provided in Sec. 5399 Rev. Stat.

This would seem to dispose of this question, but this motion is of such importance and containing, as it does, charges seriously reflecting upon the sheriff, an officer of this court, that I deem it proper, in fact almost obligatory upon me, to take up the whole question and dispose of it upon its merits, notwithstanding my notion of this section of the statutes.

Upon the evidence offered I find that the plaintiff has wholly failed

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to make out a single one of the charges she makes against the sheriff, and so far as this court is able to do so, it completely exonerates the sheriff from whatever imputation is contained in the motion.

Taking up the assignments *seriatim*:

The evidence shows conclusively that no such agreement as claimed in the first assignment, in the sense of an agreement, was ever entered into by the sheriff and the Register Publishing Company; the sheriff's sales book, which was in evidence, or inquired about, and exhibited, shows as a fact that very recently he has inserted notices of sales in another paper, notably, *Star Building & Loan Co. v. Vinson*, No. 9843, page 104; and *Star Building & Loan Co. v. Davis*, No. 9820, on page 102 of the sheriff's sales book; this conclusively shows, in my opinion, that the sheriff has not placed all of the publications of his office with the said Register Publishing Company, and does not insist on placing all of his publications with said publishing company. Besides, the sheriff and Mr. Moore, manager of the Register Publishing Company, with whom it is claimed the agreement was made, both swear most positively that no such agreement nor any agreement, was, in fact, made.

The only evidence offered to prove the allegations of the motion relative to this alleged agreement is statements claimed to have been made by the sheriff. Every lawyer knows how this class of testimony is to be received and regarded, *Crowell v. Bank*, 3 Ohio St. 406, 413, and counsel who held this conversation, must have honestly misunderstood the sheriff, or the sheriff did not make his meaning plain.

The second assignment is,

"By reason of said above agreement with the Register Publishing Company, said company has charged unreasonable and illegal fees, while the same services could have been procured from other publishing companies at a more reasonable rate."

I have already found that no such agreement existed, and the evidence failed to show that such services could have been procured at a more reasonable rate. On the contrary, Mr. Daugherty, manager of the Star, a witness, offered to sustain this allegation, told the court that the type used by his company and the manner of setting it will make precisely the same number of squares as that of the Register, and that his company charges precisely the same rate as the Register.

It is true that Mr. Yates says that he has an agreement with the Iron-tonian to have his printing done at a discount, and that he thinks it would reach a publication by the sheriff in a case in which he is counsel; but from all the court could see at the hearing and learn from the evidence the Iron-tonian was never seriously considered by any of the parties; and Mr. Yates states, also, that in all publications re-

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quiring insertion in two papers of opposite politics his impression was that the charges were the same in both papers.

As to the third assignment, I find that there is no evidence to show that prior to this controversy, the sheriff had notice, nor had any protest been made to him, that the charges for printing made by the Register Publishing Company were not in accordance with the legal rate, nor that the publications were not properly measured. The sheriff testifies very positively about this, and while counsel is clear that complaint was made to the clerk (and that is where it should be made, or to the court), he does not claim that prior to this time, any complaint was made to the sheriff.

There can be no question that the charges made by the Register in the several instances inquired about, exceeded the amount which a correct measurement, at the legal rate, would permit them to charge, but the evidence is, that this arose from an honest mistake, that their method of measurement brought about the same result as the correct method; as soon as they learned that they were wrong, they adopted the proper method of measurements. And these excess charges should have been corrected by a motion to retax costs.

The fourth assignment has been sufficiently covered by what I have said under the other assignments.

If charges in this or any other case exceed those allowed by law, the proper remedy is a motion to retax costs, and not an application for a special master commissioner to deprive the sheriff of some of his duties, and the emoluments of his office.

Not only has the sheriff a right to the full emoluments of the office to which he has been elected by the people, but the county, under the salary law, is interested in having the fees earned by the sheriff covered into the officers' fee fund, and these rights should not be abridged without some good reason for it.

Now the real question here is whether a party to an action in whose favor a decree for the sale of specific property has been made, has a right to require the sheriff to publish a notice of it in a newspaper designated by such party. And while counsel have filed their motion in the utmost good faith, it seems to me that this question could have been squarely raised upon an application to the court for that purpose.

On the question of the publication of notices of sale, except as to German newspapers, Sec. 5393 Rev. Stat. governs. I read such extracts as are applicable:

"Lands and tenements taken in execution shall not be sold until the officer causes to be given public notice of the time and place of sale, for at least thirty days before the day of sale, by advertisement in a newspaper printed and of general circulation in the county, * * .

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* but if there is published both a daily and weekly edition of the newspaper selected for such advertisement, * * * it shall be sufficient to publish the advertisement in the daily once a week, for five consecutive weeks," etc.

While the motion does not call for a decision of this question, the claim was made in the evidence of the attorneys for the motion of such right in their client, and the court will dispose of this question.

It is my opinion that Sec. 5393 Rev. Stat. casts this duty upon the officer alone, and he and his bondsmen are responsible for the proper discharge of that duty; the language is:

"Lands and tenements taken in execution shall not be sold until *the officer causes* to be given public notice of the time and place of sale."

And further:

"If there is published both a daily and weekly edition of the newspaper *selected* for such advertisement," etc.

Selected by whom? The selection must be made by somebody; and who is that somebody unless it be the officer whose duty it is to make the publication and see that it complies in all respects with the law governing the same? He has, in my opinion, a discretion in the matter, which is limited only by the statute which requires him to select "a newspaper printed and of general circulation in the county."

The approval of the publication and allowance of the costs are by act 97 O. L. 93 (Lan. Rev. Stat. 7443; B. 4370-1), cast upon the clerk or the court.

"Sec. 1. Every publication of any advertisement, notice or proclamation required to be published in a newspaper by a trustee, assignee, executor, administrator, receiver, or *any other officer of the court*, or any party in any case or proceeding shall be approved by the court or clerk thereof and allowed as a part of the costs in the case or proceedings."

The view the court has taken of the sheriff's right in such matters seems to be sustained by the case of *State v. Tual*, 9 Circ. Dec. 42 (16 R. 680). This case was a proceeding in mandamus in form, but the circuit court found that it was in substance an action to enjoin the sheriff from making the publication in a certain paper, and the circuit court dismissed the action because it had no original jurisdiction in injunction cases. The facts of the case briefly stated as shown by the petition are, that one Samuel A. Hunter, as treasurer, obtained a judgment against the defendant, Osborn, and a decree ordering the sale of lot number one in Boody's addition to the city of Toledo; that a *præcipe* was filed ordering the sale and the clerk caused to be issued to the sheriff such order of sale; that the sheriff caused appraisal to be made and a notice of sheriff's sale to be published in the Toledo

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Legal News; it is claimed that the Toledo Legal News is not a newspaper printed and of general circulation in the county, but it is a technical publication solely for the use of the court and lawyers at the bar of said county, devoted especially to the interests of the legal profession; that the Toledo Legal News contains no matters of general interest, but is simply a record of the proceedings of the several courts of said county, etc.; that there are newspapers printed and of general circulation within said county in which said notice could have been published as required by law, but that the sheriff refused, though requested to do so, to publish said notices in any other publication than the Toledo Legal News; the prayer of the petition is that a writ of mandamus issue commanding the sheriff of Lucas county, that he proceed according to law to publish said notice of the sale of said lot in a newspaper printed and of general circulation within said Lucas county in accordance with the statute in such cases made and provided.

I may say that the answer admitted practically all the averments of the petition except that the Toledo Legal News is not a newspaper of general circulation in the county of Lucas.

I read from the opinion on page 684:

“The averment in the petition is that the paper in which the sheriff is proceeding to advertise is not a newspaper of general circulation within said Lucas county and this court is asked to compel him—to require him—to proceed and advertise it, not in any particular newspaper, but in a newspaper of general circulation in the county, it being averred that the paper in which the sheriff is proceeding to advertise his notice of the sale, is not a newspaper printed and of general circulation in the county.”

And on page 685:

“But again—as already stated—this court, if it made an order under this petition, would have to make it in conformity to the prayer of the petition. And that is what? The court would have to require the sheriff to proceed to advertise in a newspaper printed and of general circulation within the county of Lucas. *This court would not undertake to point out a paper in which the sheriff should advertise.* But, practically, upon the statements contained in the petition and the grounds assigned for the interposition of the court, a mandate to advertise in any other paper than the Toledo Legal News, would be in effect equivalent to an injunction forbidding the sheriff to advertise in the Legal News, for the reason, as is alleged, that it is not a newspaper printed and of general circulation in the county of Lucas. *The court cannot under any view of the law it can regard, require the sheriff to advertise in any particular paper,* but it is asked to command the sheriff not to advertise in this particular paper.”

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This is not only the law, as I understand it, but so far as I have been able to learn it is the universal custom in Ohio for the sheriff to select the paper in which the advertising for which he is responsible shall be done.

In the opinion of the court the plaintiff shows no reason for the appointment of a special master commissioner and the motion is therefore refused.

If the plaintiff is not satisfied with the charges made by whatever paper is selected by the sheriff for this advertising, all her rights can be cared for by a motion to retax costs.

WILLS.

[Hamilton Common Pleas, January 4, 1908.]

*WILLIAM RILEY, ADMR. V. JAMES RILEY ET AL.

AUTHORITY TO CONSUME CORPUS OF ESTATE TO SUPPORT IMBECILE SON WILL BE IMPLIED.

Real estate belonging to a decedent may be sold and the corpus as well as the income used for the support of an imbecile son, when the language of the will indicates a purpose on the part of the testatrix to provide for the care and support of such son regardless of the interests of the remainder-men

[Syllabus by the court.]

J. P. Ryan and H. G. Hauck, for plaintiff.

E. M. Ballard, for defendants.

O'CONNELL, J.

The will of Mary Riley, which was duly admitted to probate and record on August 10, 1894, in the probate court of this county, is here presented for interpretation.

The will comprises nine items. Of these four are concerned with her son, James Riley. Item three describes him as "of weak mind and being unable to care for and support himself." The evidence shows that he is past the age of fifty-four years, an imbecile from birth, incurable, almost blind and at times pitifully helpless physically, and has frequently been under the care of different physicians. He is a very great care on those who have him in charge.

*Decision of the Hamilton circuit court on appeal.

PER CURIAM.

In this case, heard upon appeal, we think the judgment entry of the common pleas court places the correct construction upon the will in controversy; the property should be sold and the proceeds applied to the payment of the claim of William Riley and the balance used for the support of James Riley, an imbecile. Six dollars per week for his board, care, nursing, etc., we believe to be reasonable, and a decree may be taken similar to that entered in the court below.

Riley v. Riley.

There is no personalty and the real property of the estate for various reasons is unable to produce sufficient income to pay its current charges and repairs and afford support for this imbecile son.

The question to be decided is: Can the real estate be sold and the corpus as well as the income of the estate be used for his support?

Item two of the will provides that the "remaining income (after payment of repairs, taxes, etc.) arising from the rents and profits of said above mentioned property be applied by my executors and trustees to the sole and only support of my son James Riley as far as becomes necessary during his natural life." Standing alone, these words might not permit the sale of the real estate and the use of the corpus to support this son, but these words are followed immediately and in the same sentence with the following language: "and in case of sickness of my son, James Riley, and in event of his death my executor is to pay the same out of said income, if sufficient. If not sufficient then out of my estate that I may die seized of." "And having my son James Riley * * * properly clothed and warm and well cared for and looked after in every particular is my greatest desire."

Item three provides that if his brothers do not treat him properly then his care shall be given to a lady friend of the testatrix, if living, "if not, some other good and kind Catholic person and pay for his support."

Item seven makes the stipulation: "In case of fire that the money arising on the insurance shall be invested and proceeds arising on same to be applied for the support of James Riley and at his death divided as above mentioned."

The will taken as a whole—and under numerous authorities cited from our Supreme Court the will must be construed as a whole—leaves no doubt that the greatest desire of the testatrix was for the care and future comfort of this imbecile son. If the property could be sold to provide for his burial would it not be a violent presumption to say it could not be sold to provide maintenance and support for him while living? That her intent was to provide for him regardless of the other beneficiaries is plainly indicated by a study of item seven given above. So little did she regard the remainder-men that in case of fire the insurance money was to be used, not to rebuild and protect and preserve the corpus of the estate for the remainder-men, but the money should be invested and the proceeds arising on same to be applied for his support. *Quaere*, "proceeds arising on same" meaning "arising on the insurance" or arising on the investment?

It will be noted further that the will nowhere says that the "income only" shall be used nor by express terms is his support anywhere limited "solely" to the income. It is only by implication that such construction can arise. His physical condition can unquestionably be

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construed as such sickness as would necessitate a sale of the estate for his support, as is allowable under the latter part of item two of the will.

We can well quote here the language of our Supreme Court in interpreting the will of a testator as found in *Bierce v. Bierce*, 41 Ohio St. 241, on page 255:

“Considering the relation of the testator to Ann (his daughter), the natural interpretation of his words treats that support as the primary, the paramount object in his mind.”

So in the case at bar the paramount object of the testatrix's bounty was her imbecile son and the words of the will should be given no such narrow interpretation as would cause that son to suffer for the benefit of the remainder-men.

A decree may be entered accordingly.

COUNTIES—PUBLICATION.

[Fayette Common Pleas, September 25, 1907.]

STATE EX REL. COUNTY RECORD V. CHARLES SOLLARS ET AL.

NECESSARY ITEMIZING OF COUNTY COMMISSIONERS' ANNUAL REPORTS.

Amendatory act 97 O. L. 167 (Sec. 917 Rev. Stat.), requiring detailed reports of county commissioners to be “itemized as to amount, to whom paid and for what purpose,” demands greater precision therein than formerly. The names of persons to whom money is paid, the aggregate amount paid for any single purpose, and the purpose for which paid, such as will give definite information to taxpayers as to expenditures, are essential in the items. Instances of items failing to state whether moneys paid to justices, mayors, constables and marshals were for fees earned in civil cases or criminal cases, police or statutory duties; whether miscellaneous expenditures paid to attorneys were for defending indigent prisoners or civil suits against commissioners or other county officers, do not satisfy the statute.

[Syllabus approved by the court.]

NEWBY, J.

The case of the State of Ohio on relation of the Record Publishing Company against Charles Sollars et al., as county commissioners of this county and others, is brought to enjoin the publication of the commissioners' financial statement. The court is asked to enjoin the publication, because as is claimed, the report as filed, does not conform to the requirements of the statute.

The statute which provides for the making of the report is Sec. 917 Rev. Stat. That section provides that,

“The county commissioners, annually, on or before the third Monday in September, shall make a detailed report in writing, itemized as

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to amount, to whom paid and for what purpose, to the court of common pleas of the county, of their financial transactions during the next year preceding the time of making such report."

The objection to the report is that it is not itemized in all respects as required by the statute. The statute has been amended (97 O. L. 167), by the addition of the words "itemized as to amount, to whom paid and for what purpose." The statute as it existed prior to the amendment simply required "a detailed statement of the financial transactions of the commissioners during the preceding year.

While the statute was in this form, the Supreme Court, in the case of the *State v. Washington Co. (Comrs.)* 56 Ohio St. 631 [47 N. E. Rep. 565], held that the statute did not require a specific statement of each item of expenditure or the name of the person or persons to whom paid. In that case, the court said, in substance, that while such facts might properly appear in a detailed statement, yet a much less specific and extended subdivision would satisfy the statute.

This report is as specific and more specific in fact than the one held sufficient by the Supreme Court in *State v. Washington Co. (Comrs.) supra*, but the authority of this decision has been nullified by the amendment since made to the statute requiring the detailed report to be "itemized as to amount, to whom paid and for what purpose." The statute now requires greater precision and detail than formerly.

Upon examination of the report before me, I conclude that it does not conform to the requirements of the statute, in this, that in some instances, the report fails to show for what purpose funds were expended.

Under the heading "Justices' and Mayors' Courts" will be found the following statements:

"C. C. Bateman, Justice.....	\$71.65
D. J. Barber, Constable	13.10
C. C. Smith, Marshal	130.15"

and so on through a long list.

The report fails to state for what purpose the money was paid to the officers named, and in that respect, does not meet the requirements of the statute as to definiteness. It is not stated whether the money was paid to these officials for their fees earned in criminal cases or in civil cases or for police duty or for what purpose.

And again, further on in the report, under the heading "Miscellaneous Expenditures" we find a number of amounts paid to different members of the bar, noted in the report as to some of them as "defending" without stating whether it was for defending indigent prisoners or for services for defending civil suits against the commissioners or other county officers, while as to others, no indication whatever is given as to the purpose for which the payments were made.

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It is contended by counsel for the plaintiff that to fulfill the requirements of the statute, the report should show the dates of the payments. Take, for instance, the first item referred to, "C. C. Bateman, Justice, \$71.65," the date of that payment should be stated, and if that item is made up of several payments, it is claimed the date of each payment, and the amount of each payment should be stated, and it does not satisfy the statute to state the aggregate of the payments, and omit dates.

I do not think this contention well founded, provided the aggregate amount was paid for a single purpose, for the statute goes no farther than to require that the name of the person receiving the money, the amount paid and the purpose for which paid be stated, and does not require the dates and amounts of several payments to one person for a single purpose to be given, but permits the several payments to be stated in the aggregate, because by such a statement, the public are advised as to the amount paid, the name of the person to whom paid, and the purpose for which paid, and the detail contended for is not necessary to serve any purpose of the statute.

The commissioners' statement, in respect to the purposes of the payment as above pointed out, is not in accordance with the form prescribed by the auditor of state, nor as required by the statute governing the matter. I do not hold, however, that the auditor of state and the bureau of inspection and supervision of public offices have the right, as argued by counsel for defendants, to prescribe a form for making out these reports.

The statute prescribes the form and what the report shall contain, what information it shall give the public, and the purpose of the legislation contained in Lan. Rev. Stat. 221 (B. 181a-2) is that these officers shall prepare a form in accordance with the statute and submit it to county auditors for their guidance, to the end that thereby uniformity may be secured in the making of the reports for the different counties of the state.

The form, however, which was submitted to the auditor in this case by the auditor of state is faulty and indefinite in this: Under the heading "Justices' and Mayors' Courts," we find the following, "Allowances to Justices and Mayors, etc., R. H. Parker, \$62.50." And then under "Allowances to Constables, etc.," it is stated that a marshal and a constable each received sums of money.

The form furnished states that the money was paid to these officials for "allowances," still I think it should be more specific by stating what the allowances were for, and whether under the statute for official fees earned, or for what other purpose. The report, in order to fully and properly inform the public, ought to specify the authority for these payments by referring to the section of the statute granting the authority. I think that necessary to show fully the purpose of the payment.

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However, it is immaterial whether the model sent out by the auditor of state is sufficient or not, because the report in this case does not come up to the model or the statute. I conclude that the report, by failing in the instances pointed out, to show for what purpose the money was paid to certain officers and attorneys named, does not satisfy the statute, and the report should be either withdrawn or another filed. At any rate, it is not such a report as the commissioners are authorized to publish in any paper, because it does not convey to the taxpayers the information which the statute entitles them to receive from the report. A temporary injunction will be allowed accordingly.

ASSESSMENTS—INJUNCTION.

[Fairfield Common Pleas, May 16, 1908.]

*BENONI STEMEN V. BAKER G. HIZEY ET AL.

INJUNCTION LIES TO RESTRAIN ASSESSMENTS FOR DITCH IMPROVEMENT.

Injunction properly lies to restrain payment of an assessment for, and construction of a certain portion of, a township ditch, notwithstanding the record shows that the trustees had jurisdiction to authorize the improvement and that all the proceedings were regular, save that the benefits thereof are denied.

[Proof of this decision and syllabus has been submitted to Judge Reeves and corrected.]

DEMURRER to petition.

W. H. Lane and C. O. Beals, for plaintiff.

C. W. McCleery, for defendant.

REEVES, J.

This is an action to enjoin an assessment against the plaintiff, and also an order requiring him to make a certain portion of a township ditch, known as the Benoni Stemen ditch described in the petition.

To the petition a demurrer is interposed and the question is raised that this plaintiff is not entitled to maintain his action in equity for an injunction, because he has an adequate remedy at law. It is claimed that under the provisions of Sec. 6708 Rev. Stat. that the plaintiff has an adequate remedy at law, and that it was his duty and the law required of him, when this order was made that he enter an exception on the journal of the township trustees and prosecute a petition in error to this court to reverse or modify the decision of the township trustees, and in support of that proposition quite a number of authorities

*Affirmed by the circuit court, September term, 1908.

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have been cited, which it is claimed settles this proposition: That it was the duty of the plaintiff in this case to file a petition in error; and the principal case relied upon is the case of *Haff v. Fuller*, 45 Ohio St. 495 [15 N. E. Rep. 479], wherein it was held:

“The final orders of township trustees, establishing ditches, drains, and water courses, may be reviewed by petition in error, and reversed for errors apparent on the record. Such procedure, and not injunction restraining the construction of the ditch, drain or water course, is the appropriate remedy for the correction of such errors; and the action for an injunction to restrain the construction of a ditch, for errors and defects in the proceedings of the trustees establishing the same, cannot be maintained, where the only evidence to support the action is the ditch record, on which the errors and defects complained of appear.”

When we come to look at this case, we find that it was an action brought to enjoin the trustees, and when it came to the trial of the case they introduced no evidence whatever. The matters complained of are:

1. The petition for the ditch does not state that it will be conducive to the public health, convenience or welfare.
2. The trustees made no finding that the petitioners filed a bond or gave notice of the pendency or hearing of the petition, nor that the ditch would be conducive to the public convenience or welfare.
3. That the trustees lost jurisdiction during the hearing.
4. One of the trustees was a brother of a petitioner for the ditch.

When it came to the trial of this case in the court of common pleas, judgment was rendered perpetually enjoining the construction of the ditch and the defendants prosecuted error to obtain a reversal of that judgment. The only thing that was introduced was the record of the township trustees. No other evidence was offered and it appeared that all those errors complained of were apparent on the record. One of the trustees was a brother of a petitioner for the ditch. There is no way of challenging a trustee like you can a juror. It has been held that where an auditor or county commissioner is a relative, and there is no provision to supply his place on the board, that that fact is not an error for which proceedings will be enjoined.

What does the court say? Reading from *Haff v. Fuller, supra*, page 498:

In cases of that kind, if it be shown, contrary to what appears on the record, that the board or tribunal proceeded without jurisdiction, injunctions may be granted, for there is then no adequate remedy at law. *Anderson v. Hamilton Co. (Comrs.)* 12 Ohio St. 635; *Hays v. Jones*, 27 Ohio St. 218. And where the judgment or order has been obtained by the fraud or misconduct of the party, or other circumstances of fraud, accident or mistake or the like are shown, it has been held that injunction restraining the execution of the judgment or order

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is a proper remedy. *Gifford v. Morrison*, 37 Ohio St. 502, 506 [41 Am. Rep. 537]; *Frevert v. Finfrook*, 31 Ohio St. 621, 627. But nothing of the kind is claimed in this case.

"We do not find it necessary to decide here whether the defects in the ditch record given in evidence by the plaintiff on the trial of the action in the circuit court, are such as to require or authorize the reversal of the order of the trustees establishing the ditch. He gave no evidence in support of his action but the record, and therefore whatever infirmities there were in the proceedings of the trustees, of which he sought to avail himself, were apparent on the record. If they were not of that substantial character which affected the validity of the proceedings, he was not entitled upon that proof to the perpetual injunction granted him. If they were of that character, they appeared on the face of the record, and the remedy by petition in error to reverse was open to him. Such a proceeding afforded a plain and adequate remedy, and no ground for interference by a court of equity by injunction was shown."

In that behalf there are two or three other cases of the same character. There is the case of *Anderson v. Hamilton Co. (Comrs.) supra*, that was a petition in error. In that case it was claimed that, while the record on its face shows that the petition for the ditch was signed by twenty petitioners and presented to the commissioners and that notice had been given, it was averred that not twelve of those twenty were freeholders, and that in fact no notice had been given. An attempt was made to introduce testimony upon that claim to show that there were not twelve of those petitioners freeholders, and that notice had not actually been given, which the court refused to allow to be introduced. The case was taken to the Supreme Court which merely hinted at the question as to whether a petition in error was the proper remedy, but the Supreme Court held that the court of common pleas erred in not allowing the plaintiff to show that there was not a petition signed by at least twelve freeholders, and no notice as prescribed by the statute. There was no finding in the record that these were freeholders; there was no copy of the notice in the record. You must observe that these two matters were jurisdictional facts. If the petition for the ditch was not signed by twelve freeholders and notice not given as required by law, the commissioners never obtained jurisdiction. The court held that question might be raised in a proceeding in error, and that therefore the court of common pleas erred in not allowing the plaintiff to show that the commissioners never did obtain jurisdiction. You will find that when this case is referred to in subsequent decisions, the court called attention to the fact that the errors for which it was reversed went to the jurisdiction of the court. The questions raised in this court do not go to the jurisdiction of the trustees at all. It is admitted that

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the trustees had jurisdiction; it is admitted that a proper petition was filed, that notice was given, that this plaintiff had notice and appeared before the trustees and attempted to assert his rights. Let us look at some other cases.

The court says in *Greene Co. (Comrs.) v. Harbine*, 74 Ohio St. 318, 327:

"In *Haff v. Fuller*, 45 Ohio St. 495, it is held that the final orders of the township trustees establishing ditches may be reversed by petition in error for errors apparent on the record; and that such procedure and not injunction is the appropriate remedy for the correction of such errors, and in the opinion it is said that the same rule applies to the final orders of county commissioners establishing ditches; that the rule has been applied where the errors so appearing render the proceedings void for want of jurisdiction.

"In the present case the want of jurisdiction does not arise from some error appearing on the record of the proceedings but from want of power in the commissioners to act at all."

I will now call attention to the case of *Lewis v. Laylin*, 46 Ohio St. 663, 676 [23 N. E. Rep. 288]:

"The principle decided in *Haff v. Fuller*, *supra*, applies equally as well to proceedings before county commissioners under the two-mile assessment pike laws, as to proceedings before township trustees under the ditch laws. In that case the action was directly to enjoin the construction of the improvement (a ditch), while in the case before us it was to enjoin the collection of an assessment to pay its cost, which latter action is authorized by chapter 13 of the code of civil procedure; but, in either case, it was the jurisdiction of the board and the regularity of the proceeding had before it, that were challenged; and the right of the party to do this in equity, cannot depend upon his lying by until the improvement is substantially completed, and then seeking to accomplish by its aid what he could have done by a proceeding in error. The rule is laid down in 45 Ohio St. [495], 497, [*supra*], as follows: 'As a result of the rule that courts of equity do not entertain jurisdiction for the enforcement of rights, or the prevention of wrongs, when the legal tribunals are capable of affording redress, it is always a sufficient objection to the granting of an injunction, that the party aggrieved has a full and adequate remedy at law. In the application of the rule it is accordingly held, that courts of equity will not sit as courts of error, to revise and correct proceedings at law, or grant injunctions against judgments, because of errors in the proceedings, where proper relief can be had in the ordinary course of appellate procedure.' The omissions and irregularities, held by the circuit court to be errors invalidating the proceeding had before the county commissioners, were all apparent on the face, and for their correction there was provided a

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legal remedy by petition in error, and they were not proper predicates for equitable relief."

Now the difference between these cases and the case at bar is that the errors complained of are not jurisdictional facts, nor do they appear on the face of the record.

Let us look at the case of *Hays v. Jones, supra*.

The fourth paragraph of the syllabus is as follows:

"In cases arising under these road improvement statutes, where no remedy is named, and the jurisdiction of the board of county commissioners is made the question, proceedings in equity to inquire into the jurisdictional facts, and for injunction, is a proper remedy."

This matter was also examined in *Musser v. Adair*, 55 Ohio St. 466, 476 [45 N. E. Rep. 903]:

"Reliance is placed upon *Haff v. Fuller*, 45 Ohio St. 495, and *Lewis v. Laylin*, 46 Ohio St. 663. These cases, as will be shown, must be confined to their particular facts. The first was a suit to enjoin the construction of a ditch. In such cases records are required to be made and kept of their proceedings; and it was there held that a proceeding in error is the proper remedy, where the defects complained of are apparent on the face of the record, and that injunction is only proper where they do not, and have to be supplied by averment. The same may be said of *Lewis v. Laylin*. It grew out of a road improvement under the two-mile law; and the assessments were questioned on irregularities in the proceedings, and averments made of matters *aliunde* the record. The only evidence introduced of the irregularities charged, was the record itself; these the court regarded as of no consequence, and remarked that the case could be disposed of for this reason on the decision of the former case. In *Genin's Exr. v. Belmont Co. (Aud.)* 18 Ohio St. 534, no question was made or considered by the court as to the review of the proceedings of the auditor on error. The question passed *sub silentio*, and the case is therefore, not authority on the point.

"Authority for a proceeding in error in such cases is based upon the clause in Sec. 6708 Rev. Stat., conferring jurisdiction in error on the court of common pleas to review the judgments of justices of the peace and probate courts; and by which it is extended to 'any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the court of common pleas.' This clause of the section, so far as it relates to ministerial officers, is open to the objection on which *Logan Branch Bank, ex parte*, was decided. This case is sound in principle, and should not be departed from further than has been done in the two preceding cases. The above clause in Sec. 6708 cannot be applied to cases coming within the provisions of Sec. 5848 Rev. Stat., affording a remedy by injunction against the collection of illegal taxes and assessments. On well settled principles of construction, the

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provisions of this section must be excepted out of the generality of the language used in Sec. 6708. If not, a statute, highly remedial, would, in a measure, be emasculated."

Now what are the facts in this case? It is admitted to be in court upon the question of assessment of benefits. There is no question that the proceedings are not regular. Where and how could the plaintiff file a petition in error? It has been decided and so stated by the Supreme Court in nearly all these cases (and it is a question to which there can be no contest) that if an assessment is improperly and corruptly made, or if it is made by fraud or mistake, it may deprive a man of his property without giving him any remedy whatever, if he has no remedy by application to a court of equity. The constitution says you cannot take his property without giving him compensation. How is the compensation fixed in the first instance? If it is a township road or township ditch, it is fixed by the trustees; if a county road or county ditch, by viewers appointed by the commissioners. He has an appeal from this decision to the probate court, where he may have a jury. Therefore that provision of the constitution is complied with. He can have that appeal, but when it comes to the matter of assessment (and that may be either in requiring a party to pay a certain amount of money, or construct a certain portion of the improvement) there is no appeal given him whatever, if he is not satisfied with that. The only thing left for him is an application to a court of equity, and in one of those decisions it is said that right is given him outside of any statute. It is a constitutional right and you cannot deprive him of it.

Suppose for instance in the location of a ditch or road, the trustees and the appraisers should conspire together and would say, "You need not allow him any compensation." Suppose the trustees would say, "You need not allow him any compensation for land taken," he can take his appeal in that matter and have a jury come out and assess it, but we will fix him in another way; we will allow him a good round compensation and his damages, but wait until you come to the construction of the road and then we will settle with him; we will settle the compensation with him in assessing benefits." What remedy has he? His only remedy is by application to a court of equity. That matter was fully settled in *Blue v. Wentz*, 54 Ohio St. 247 [43 N. E. Rep. 493]. My attention is called to the fact that the petition in this case is practically, so far as the facts can be applied, copied from *Blue v. Wentz*, *supra*. There had been the same proceedings. The court in that case says, page 255:

"The right which the higher tenement has to require the lower one to receive from it the surface water that naturally drains to and upon it, is a right incident to the higher tenement, and a part of the property of the owner in it; and for any invasion of this right the law will afford him a remedy. Washburn, Easements 23, 211, 336; *Tootle v. Clifton*,

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22 Ohio St. 247 [10 Am. Rep. 732]; *Butler v. Peck*, 16 Ohio St. 334 [88 Am. Dec. 452]; *Crawford v. Rambo*, 44 Ohio St. 279, 284 [7 N. E. Rep. 429]; *Kauffman v. Griesemer*, 26 Pa. St. 407 [67 Am. Dec. 437]. The reason for this usually given, and generally accepted, is that water is naturally descendible, so that, in the course of nature, water must flow from a higher to a lower level; and the owner is entitled to enjoy his property with such natural advantages as are derived from its situation."

And again on page 256 the court says:

"The petition of the plaintiffs makes a case for relief; and, if the facts are as stated in the petition, the assessments should be enjoined. Or if some benefits are conferred on the lands of the plaintiffs by the improvement for which, within the principles before stated, they may be assessed, power is conferred on the court by Sec. 4491 Rev. Stat., to set aside the assessments and cause such apportionment of the cost and expenses to be made, as is required by the facts of the case."

After carefully examining the matter, I am satisfied that, while jurisdictional facts appear on the record, yet under the allegations of the petition and the state of the proceedings, the proper remedy is by injunction and the demurrer will be overruled.

Exceptions noted by defendants.

BUILDING ASSOCIATIONS—ESTOPPEL.

[Superior Court of Cincinnati, 1908.]

FRANCIS METZ V. MCCOOK LOAN & BLDG. CO.

1. BORROWING MEMBER OF BUILDING ASSOCIATION BOUND BY AMENDMENT ENACTED SUBSEQUENTLY TO HIS ADMISSION.

A borrowing member of a building association becoming such in 1888, when the Kuehnert law (act 83 O. L. 116) permitting such associations to amend their constitutions was in force, and when such association was working under a constitution providing for amendments thereto, is bound by an amendment enacted subsequently to his admission, providing that interest should be charged only on the amount remaining due at the end of each year, and dividends paid only on the amount paid in during the current year, he having agreed to abide by future amendments.

[For other cases in point, see 2 Cyc. Dig., "Building and Loan Assns.," §§ 20-28.—Ed.]

2. ESTOPPEL BY ACQUIESCENCE AND SILENCE OF BUILDING ASSOCIATION MEMBER.

A borrowing member of a building association having acquiesced for seven years in semi-annual settlements made by the association before he ceased to be a member, and then remaining silent for another six years after the final settlement with him, and until the membership of the association had changed and it no longer had control of the earnings thus dis-

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tributed, is estopped from demanding an accounting for any larger share of the profits of the association than was received by him in due course.

[Syllabus approved by the court.]

Winkler & Spicer, for plaintiff.

H. G. Hauck and F. F. Dinsmore, for defendant.

SPIEGEL, J.

Plaintiff alleges that she is the widow of Charles Metz, who on October 15, 1888, became a member of the defendant company, subscribing to five shares of its stock of the value of \$500 per share, upon which he borrowed the sum of \$2,250, the value of four and one-half shares, securing said loan by a mortgage containing the usual conditions of a building association mortgage, and concluding with the clause, "and that he will comply with the constitution and by-laws of the said company, and all amendments thereto." At the death of the said Charles Metz plaintiff became the owner of said shares of stock, and continued the payment of said loan in weekly installments from the death of her husband, April 6, 1896, until July 1, 1902, when she paid off said loan, had the mortgage canceled and her membership in said building association terminated.

Plaintiff alleges that at the time her deceased husband became a member of said company and contracted for said loan, its constitution provided, among other things, that the profits of said company should be calculated every six months, and after the payment of expenses, and deductions for a reserve fund, the balance should be transferred to the credit of all members, borrowing and nonborrowing; that this was done until August 10, 1906; that afterward, contrary to the provision of said constitution, the defendant refused to pay dividends to plaintiff *pro rata* upon the whole amount of money theretofore paid in by her deceased husband and herself up to the six months prior to the time of the declaring said dividends, and instead paid to plaintiff dividends only on the amounts paid in by her on the principal of her indebtedness during the six months prior to the declaration of such dividends, although plaintiff made demand therefor and was entitled thereto.

Upon this statement of facts plaintiff prays for an accounting and that the dividends due her from August 10, 1906, to July 1, 1902, should be determined and judgment awarded her for the amount so found, together with interest. A copy of the constitution in force October 15, 1888, is attached to the petition.

Defendant's answer admits the allegations of plaintiff's petition, but pleads two defenses:

That in accordance with the constitution which authorized amendments, and with the contract entered into by plaintiff's decedent to abide by all amendments thereto, said constitution was amended Sep-

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tember 9, 1895, providing that the earnings of the company should be calculated semi-annually and applied to the payment of expenses and to the reserve fund, and the balance transferred to the credit of the members; further, that each share for which money had been drawn should be considered as a paid out share, and that interest should be charged only on the amount remaining due at the beginning of each year, and dividends paid only on the amount paid in during the current year.

2. Defendant further defends that from September 9, 1895, until the date of the filing of the petition herein, September 12, 1907, during a period of twelve years, it acted in accordance with the amendment, distributing its earnings to, and making settlement with, all its members, borrowing and nonborrowing alike on this basis; that all profits earned prior to the cancellation of the mortgage of Charles Metz, namely, July 1, 1902, have been distributed and that defendant has no longer any control over the same, and over those earned since that time; that Charles Metz and the plaintiff herein had full knowledge of the manner in which said earnings were distributed under the amendment to the constitution, received their dividends and acquiesced in said distribution up to and until the settlement and payment of the loan on July 1, 1902, and further acquiesced in said final settlement until the filing of the petition in this cause, a period of more than five years.

To this answer plaintiff has filed a general demurrer.

It will not be necessary in the determination of the cause to again discuss the elementary proposition that both the federal and state constitutions guarantee the inviolability of contracts, and that one contracting party cannot change the contract to the detriment of the other. That question is not involved in the case at bar. Defendant claims, and the demurrer admits it, that plaintiff entered into a contract to be in force not only in accordance with the provisions of the then existing constitution, but also in accordance with all future amendments thereto. This contract was entered into in the year 1888, when the Kuehnert law (act 83 O. L. 116) authorizing building associations to amend their constitutions was in force, having been adopted in 1886. The law was passed to annul the effect of a decision of our Supreme Court in *Seibel v. Building Assn.* 43 Ohio St. 371 [2 N. E. Rep. 417], holding that there could be no discrimination between nonborrowing and borrowing members in the distribution of dividends by a building association. The Kuehnert law authorized building associations to amend their constitutions so as to provide that the dividends of borrowing members should be calculated only upon their annual payments, but that the reduction of interest should be made upon their entire payments; whereas, the calculation of dividends of nonborrowing members should be upon the total undrawn payment made by them on their shares. It was in ac-

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cordance with this law in force two years before Charles Metz became a member of the defendant, that said company amended its constitution, and dealt with him and plaintiff accordingly.

An examination of the constitution in force in 1888 attached to the petition shows that it contained no amendments. The contract of Charles Metz that he would abide the constitution and all amendments thereto must therefore refer to future amendments, and if these amendments were not obnoxious to law or equity he is bound thereby. The Kuehnert law authorized this amendment, and as Charles Metz contracted with a view to future legal amendments he is bound by his contract.

Under the second defense the company claims that for a period of seven years, from 1895 to 1902, when the plaintiff ceased to be a member of the company, having paid the loan in full, semiannual dividends were declared, credited and accepted by plaintiff in accordance with the amended constitution, and that for a further period of six years, until the filing of this suit, such final settlement was acquiesced in by her; that said company no longer has any control of its then earnings, owing to change in membership during said period, and that it would be unable to collect from those who received more than their proportionate share under plaintiff's contention, and that the loss would have to fall upon innocent parties now members of the company.

If those facts are established by a preponderance of the evidence in accordance with the well established rules of equity, then again plaintiff could not recover.

Upon this state of facts the demurrer must be overruled. I cannot see how leave to plead further can be granted.

Judgment accordingly.

ARREST—COURTS.

[Lucas Common Pleas, July 6, 1908.]

EDWARD H. FIELDS V. JOHN J. RAGELMEIR ET AL.

PRIVILEGE OF CIVIL PROCESS DOES NOT EXTEND TO SUITOR IN CRIMINAL PROCEEDING.

The privilege from arrest extended by Sec. 5457 Rev. Stat. is distinguished in its application to suitors in civil and criminal proceedings. Hence, under Sec. 5459, denying the extension of such privilege to criminal cases, service of process in a civil action upon an accused person, voluntarily seeking a hearing before a grand jury in a county other than that of his residence, will not be quashed as invalid.

[For other cases in point, see 1 Cyc. Dig., "Arrest," §§ 11-20.—Ed.]

[Syllabus approved by the court.]

Fields v. Ragelmeir.

MOTION to quash service.

Beard & Beard, for plaintiff.

Chittenden & Chittenden, for defendants.

BASSETT, J.

Two separate motions are filed in this case, one by the defendant, John J. Ragelmeir, and one by the defendant, George W. Crawford, each motion containing the same grounds, to wit, moving the court to quash the service of summons herein and dismiss said action, for the reason that said court has no jurisdiction over the person of the defendants.

By the agreed statement of facts it appears that the defendant, Ragelmeir was, on February 17, 1908, present at a preliminary hearing or investigation before a justice of the peace in Lucas county, Ohio, and was by such justice ordered to enter into a recognizance to appear before the court of common pleas of Lucas county, Ohio, then in session; that thereafter the grand jury of said county convened on March 9, 1908, and was in session on March 11, 1908, when the defendant, John J. Ragelmeir, was served with summons in this case, that is, in the case now under consideration; that the defendant, Ragelmeir, was never at any time summoned or subpoenaed to appear before said grand jury on said March 11, 1908, or at any other time during said term nor during the session of said grand jury; nor was he at any time requested by any member of the said grand jury or said court, or any officer of said court, nor by the prosecuting attorney of said county or any of his assistants, nor by the clerk of said court, or any of his deputies, at any time on said March 11, 1908, or any other time, to come from the county of Defiance, Ohio, and appear before said grand jury, as a witness in his own defense, or in any other capacity. That said Ragelmeir without any petition or request, or without any summons or subpoena, but on his own suggestion, came before said grand jury on said March 11, 1908; that said bond given in said criminal proceeding in said justice court, did not provide, nor did said justice of the peace order that said John J. Ragelmeir appear from time to time before said court of common pleas of Lucas county to await the grand jury of said county, nor that said plaintiff should not depart therefrom without leave.

Certain authorities have been cited by counsel for the mover, among which is the case of *Andrews v. Lembeck*, 46 Ohio St. 38 [18 N. E. Rep. 483; 15 Am. St. Rep. 547]. In this case an injunction was sought in Medina county, the judges of that judicial district being engaged and not being able to hear the case, notice was served upon the defendant to appear before one of the judges in Cuyahoga county, in the same judicial district. Upon the hearing in Cuyahoga county, the defendant, a party to the suit, appeared, on the advice of his counsel that his

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presence might be necessary during the hearing, and the Supreme Court held that, under Sec. 5459, he was exempt from service, and that the summons there served upon him in another civil action was not good service.

There is another case, cited on page 42, *Compton v. Wilder*, 40 Ohio St. 130, in which the defendant in a criminal prosecution was extradited from Pennsylvania to Ohio, and while in Ohio, the complaining witness undertook to and did have served upon the defendant (prior to his entering into bail, or at least soon after entering into bail and prior to his leaving the state by the easiest and earliest means of leaving,) a summons and arrest. In that case the Supreme Court held that as a matter of good faith, the complaining witness had not made good service; and as a matter of good faith between the state of Ohio and the state of Pennsylvania, such practice would not be tolerated; therefore the court held that the service was invalid and that the defendant, a nonresident, was not required by law to answer to the summons, that he was not in court in a lawful manner, and the summons was set aside. *Mayer v. Nelson*, 54 Neb. 434 [74 N. W. Rep. 841]; *Letherby v. Shaver*, 73 Mich. 500 [41 N. W. Rep. 677]; *Byler v. Jones*, 22 Mo. App. 623.

Section 5457 of the Revised Statutes of Ohio sets forth certain persons who are privileged from arrest. Among those privileged from arrest are officers, suitors and witnesses while going to, attending or returning from court. The only qualification to that provision is found in Sec. 5459 Rev. Stat., which says,

"Nothing in this subdivision contained shall be construed to extend to cases of treason, felony, or breach of the peace, or to privilege any person herein specified from being served at any time with a summons or notice to appear."

It will be noticed in *Compton v. Wilder*, *supra*, that they not only had served the summons or notice to appear, but they also had issued the order for arrest, and the court held, that consequently it was invalid.

In this case no order for arrest has been made. Under the common law a *capias* is a writ commanding the sheriff to take charge of the defendant and have him before the court to answer the charge therein contained; it is called a *capias ad respondendum* when issued before judgment and a *capias ad faciendum* when issued after judgment. It directs that the defendant be compelled to appear, while the sole object of the summons is that he be notified. We state this merely as a means of distinguishing between a *capias* at common law and a summons under our code.

When the defendant, Ragelmeir, voluntarily entered into Lucas county and voluntarily appeared before the grand jury, he, of his own accord, submitted himself to that jurisdiction. He had no

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legal right to appear before the grand jury; he could not introduce witnesses; he could not challenge the jurors before the oath was administered; he could not demur to the complaint, nor cross-examine the complaining witness, until the indictment was filed and the case docketed and the defendant arrested. He could not be considered as in court and compelled to make answer; neither could the grand jury punish him as for contempt by exercising the ordinary powers of a court of law. *State v. Hamlin*, 47 Conn. 95; *State v. Wolcott*, 21 Conn. 271; *People v. Goldenson*, 76 Cal. 328 [19 Pac. Rep. 161].

In *Compton v. Wilder*, to which we have referred, it was found there that the plaintiff had acted in bad faith, in forcibly bringing a nonresident of Ohio into the jurisdiction. This case, however, now on hearing, is free of the charge even of malice, fraud, connivance or procurement on the part of the plaintiff to inveigle the defendant into this jurisdiction; indeed the agreed statement of facts shows that the defendant came here voluntarily, and without a subpoena appeared before the grand jury. The case is not only free from the objection that it is not in good faith or in fraud of the law, but it is free from the objection that the service of summons or notice was served upon the defendant in a manner which tends to impede or embarrass the administration of public justice; for, as the court has already said, he had no lawful occasion to attend upon the hearing before the grand jury. The weight of authority seems to favor a distinction to be made between a criminal and a civil case; that is to say, a suitor in a civil case, while attending that case in his own interest, either as a witness or a suitor or otherwise, is privileged from being served with a summons in another civil action.

In the case of *White v. Underwood*, 46 L. R. A. 706 (N. C.), it is said:

"Confinement in jail for default of bail in a criminal case does not preclude legal service on the prisoner of summons in a civil action with an order of arrest and bail ancillary thereto."

We do not think the decisions in Ohio go that far. Again it is said, page 707:

"A person in custody on a criminal charge may, before or after conviction, be served with civil process." *Slade v. Joseph*, 5 Daly (N. Y.) 187, 190; *Byler v. Jones*, 22 Mo. App. 623 (4 West. 896); *Moore v. Green*, 73 N. C. 394 [21 Am. Rep. 470].

Again on page 709, it is quoted as follows:

"The absence of privilege afforded by a criminal arrest is illustrated by cases recognizing the validity of service immediately after a discharge from custody while defendant is still practically in the power of the court."

"One who has been convicted of an assault in a court of special

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sessions is not privileged, while returning home, from arrest in a civil action." *Lucas v. Albee*, 1 Denio 666.

"A defendant who has been brought into court by a criminal process and discharged from arrest upon giving bail is not exempt from arrest on a civil process immediately afterwards, before he leaves the court room." *Moore v. Green*, 73 N. C. 394 [21 Am. Rep. 470].

"One under lawful arrest is not on that account exempted from service of civil process; and there is no reason why one arrested in another county, and taken from that county into the county within which the plaintiff resides,—provided that where the arrest was procured by the plaintiff it was procured rightfully,—may not be served with a summons in a suit brought by the plaintiff." *Byler v. Jones*, *supra*.

"Service upon one, induced by false representations, to come into the jurisdiction of a court, for the process upon him, is to abuse the process, and will, on motion, be set aside. *Byler v. Jones*, *supra*; *Pilcher v. Graham*, 9 Circ. Dec. 825 (18 R. 5).

But as the court has already said, the question of bad faith does not enter into this case. Again it is said in the case of *Smith v. Nicola*, 19 Pa. Co. Ct. Rep. 440 [6 Pa. Dist. Rep. 595]:

"A defendant attending court to answer a criminal charge, is not privileged from service of civil process."

The next case that is noted in plaintiff's brief is the case of *Krell Piano Co. v. Krell*, 12 Dec. 633. We have not the case here, but that is a case in Hamilton county where a nonresident of the county appeared in Cincinnati at the time certain depositions were taken. Instead of attending to his legal business and returning home with reasonable promptness after the depositions were taken, he stayed in the city and made personal visits; and the court held that the service was good because he had delayed or deviated from the usual course of returning home in the usual time. In other words, he was voluntarily there for his own personal pleasure or gratification and was not there by reason of the service of summons or in attendance on a trial, and therefore was not privileged from service on that account.

It is held in the case of *Moyer v. Place*, 13 Pa. Co. Ct. Rep. 163: "A party to a civil suit in attendance on the trial, is privileged from service of a writ. No such privilege exists where the party served is a defendant in a criminal indictment," and the case proceeds along that line. A great many other cases to the same effect might be cited, but for present purposes it is needless to do so.

So that, by reason of the agreed statement of facts, and the law, the court holds that the service of summons upon each defendant in this case was valid. The motions are therefore overruled.

Machine Co. v. Neth.

COURTS—INJUNCTIONS—PATENTS.

[Montgomery Common Pleas, April 8, 1904.]

*RECORDING & COMPUTING MACHINES CO. V. GEORGE NETH ET AL.

1. JURISDICTION OF STATE COURTS CONCERNING PATENTS AND SECRET MECHANICAL IDEAS.

A state court has jurisdiction to enjoin the divulging of secret mechanical ideas the knowledge of which was obtained in confidence and to protect the rights of parties concerning patents, notwithstanding infringement suits may be pending in the federal courts.

[For other cases in point, see 6 Cyc. Dig., "Patents," §§ 49-52.—Ed.]

2. FAILURE TO SIGN CONTRACT DOES NOT NECESSARILY DEPRIVE IT OF BINDING CHARACTER.

The minds of the parties having met with reference to a proposed contract in writing, and the conditions to be embodied therein, the mere fact that the contract, which was not ready for signature at the time of reaching the agreement was never signed does not deprive it of its binding character. Hence, such a contract, where not within the scope of the statute of frauds, is enforceable.

[For other cases in point, see 2 Cyc. Dig., "Contracts," §§ 278, 279.—Ed.]

3. DISCLOSURE OF MECHANICAL SECRETS CONFIDENTIALLY OBTAINED BY EMPLOYEE WILL BE ENJOINED.

One employed to perfect an invention occupies a confidential relation toward his employer, and is not at liberty to make disclosures concerning mechanical secrets learned in the experimenting room. Accordingly he will not be permitted, after successfully accomplishing the work for which he was employed and perfecting the machine, to claim title thereto as against his employer, or to engage in work for a rival concern on the same machine or other machines involving the same mechanical features, or involving the devices or ideas peculiar to such machine.

[For other cases in point, see 5 Cyc. Dig., "Injunctions," §§ 318-322; 6 Cyc. Dig., "Patents," § 45; 7 Cyc. Dig., "Trade Secrets," §§ 3-9.—Ed.]

[Syllabus approved by the court.]

INJUNCTION.

Sprigg, Fitzgerald & Sprigg, for plaintiff.

R. J. McCarty, Dickson & Clark and Young & Young, for defendants.

KUMLER, J. (Orally.)

This matter came before Judge Brown last July on an application for a temporary restraining order to restrain George Neth and Clarence H. Tamplin from giving away or divulging certain information or transferring certain patents, patent rights, and so on.

On that application a temporary restraining order was issued, and the matter came up before this court some three or four weeks ago to be heard upon its merits.

The plaintiff, after making the usual averments, alleges that on

*Affirmed on appeal by the circuit court without report, and on error by the Supreme Court, without report, *Neth v. Machines Co.* 75 Ohio St. 603.

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February 5, 1904, William I. Ohmer sold and transferred to plaintiff, the Recording & Computing Machine Company, all of his interest in certain car fare registers, inventions, processes and so on. The petition then avers that for several years last past the defendants, Neth and Tamplin, have been employed by said Ohmer and by the plaintiff as successors, as experimenters under the direction of said Ohmer in the experiment department of their said business, and in a confidential relation to them, and have received large salaries under said employment from plaintiff and the said Ohmer. By reason of their connection with the said experimental department of plaintiff said Neth and Tamplin have acquired valuable information as to mechanism of the machines being developed and manufactured by the plaintiff; that on or about June 10, 1904, the defendants, Neth and Tamplin, represented to the officers of the company that they had developed a certain machine, representing to them that it was new in mechanism and principle and that it was patentable and did not infringe upon any other mechanism of any other person whatsoever. Whereupon Mr. Ohmer, acting in behalf of plaintiff, entered into a contract in his name with the defendants, Neth and Tamplin, by the terms of which he agreed to buy of the defendants, Neth and Tamplin, the said improved mechanism and registering machine, when said machine was completed as a practicable and acceptable registering machine; that Ohmer was to pay them \$200 in cash and was to pay them certain wages and was to furnish them with room and tools and implements by which to carry out this scheme, and if the machine was acceptable to him when constructed, he was to pay them the sum of \$4,000. That the defendants, Neth and Tamplin, accepted said agreement and that said agreement was fully entered into for a valuable consideration. But after the contract was all agreed upon they declined to sign the contract; and that subsequent to that time they sold said improvement mechanism to a rival concern. Plaintiff further avers that while they were working as employes of the plaintiff they acquired all of the secrets of the mechanism of the cash car register machines—in fact, they knew as much about it as Ohmer himself; and they say that said defendants are about to divulge all of those secrets, and that they not only do that, but claim to be inventors thereof.

The petition prays that the defendants may be enjoined from communicating any of the secrets which were acquired in a confidential way, and also from transferring any of the patents or any of the patentable interests in these machines, and also that when said machine is completed the defendants be required to exhibit the machine to Mr. Ohmer for his inspection, and if it is such a machine as represented and as called for by the contract, that plaintiff have the option to take

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the same at the agreed price, he being willing to perform all and singular his part of the contract, and for equitable relief.

To this petition there is a motion filed to dissolve the injunction, and also an answer filed last July. During the trial of the case another motion was filed to strike out and to have the causes of action separately stated and numbered and then require plaintiff to elect upon which he will proceed. The matter came on for hearing, and the testimony is as follows:

That Ohmer was for twelve or thirteen years engaged in this business, in attempting to get up some patent registering machine, for the use of street car conductors; that he spent part of his time abroad, part of his time here; that he opened a shop on East First street; that he had expended in all in the last ten or twelve years in the neighborhood of \$200,000 in order to perfect a machine of this character; that he had gotten up numerous models, sketches and drawings; that in December, 1891, he employed the defendant, Tamplin, as a mechanic to do most anything that was to be done around the premises; that on January 20, 1902, he employed Neth. Neth was employed for the purpose, as he testifies, of working in the experiment department under Mr. Ohmer's instructions and the instructions of the foreman at that time. Neth, when he was employed, received a salary of \$2.75 a day. He worked in that capacity until the following fall, I think it was, when the foreman resigned. Thereupon Neth was promoted, as Ohmer says, to be foreman of the experiment room at a salary of \$21 and something a week; that soon after Neth came there Tamplin was also transferred to the experiment room, and his salary was increased from \$15 to \$16.80 a week. They were working all the time, so far as the testimony shows, on these machines.

They got out what was known as machine No. 1 first. After machine No. 1 was out they commenced to build machine No. 2, which contained, as the testimony shows, valuable improvements on No. 1; and after No. 2 was out Mr. Ohmer succeeded in getting a patent on No. 2. Then they commenced to construct No. 3, with the idea and for the purpose of placing on that machine some more valuable improvements. It was supposed to be the best machine of the three.

No patent has ever been taken out on No. 1; no patent has ever been taken out on No. 3, but if we understand the testimony an application has been made at the patent office for the allowance of patents on No. 1 and No. 3; that allowance has been granted, but the patent has not been issued.

Now, the claim of the plaintiff in this matter is that everything went along smoothly so far as it knew in the matter, until about the latter part of May or first of June, 1904. At that time, as plaintiff

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says, and as Ohmer and Whistler, his assistant, testify, they missed the two defendants from the office and Ohmer made inquiry and Mr. Neth said he had been sick. The testimony does not show exactly what Mr. Tamplin's excuse was. At any rate, there was a meeting arranged by Whistler, the assistant, between Mr. Ohmer and Tamplin and Neth at the Beckel House. Mr. Ohmer testifies that that is the first knowledge that he ever had of the improved machine that they tried to sell him and the first knowledge that he ever had that they claimed any interest as inventors in the machines 1, 2 and 3. A rough proposition was submitted to him at that time at the Beckel House on Friday, June 10, 1904. He took the matter up with the defendants, and they agreed to meet him at his shop the next morning, which was Saturday morning.

Three propositions were submitted after the defendants had had a consultation for perhaps an hour or more in the experiment room. They had the contract and all the propositions together. After having consulted for some time they repaired to the main office, as Mr. Ohmer and Mr. Whistler testify, and the defendants, Neth and Tamplin, said there were three things they wanted added to the contract; one was that they wanted their wages to be stated in the contract, another was that Tamplin's name should be inserted in the contract with that of Neth, and the third was that they should receive \$200 cash.

These things, as Mr. Ohmer testified, were assented to on his part. They then left and came back on Saturday afternoon, and at that time the matter was deferred until the following Monday morning. On Monday morning they came around and insisted on another proposition, as the testimony of the plaintiff tends to show, and that was that, in the course of construction of this machine, should it in any wise interfere with any of the patents on 1, 2 and 3, they should be given the privilege of using so much of those patents as went to perfect this other machine which they were talking about. After some hesitation upon the part of Ohmer, as they all testify, he finally assented to that, and that was embodied in a rough proposition.

It seems from the testimony that all of the parties, Ohmer, Neth and Tamplin, were anxious to consult some lawyer to get the contract in legal form and have everything all right, and finally they agreed to consult Mr. John A. McMahon. In the afternoon of Monday, June 13, they all went to Mr. McMahon's office, and I think he was busy trying some case up until 5 o'clock—at least it was late when they got there. He was informed of their mission by Mr. Ohmer, who seems to have been foremost of the three; that they wanted him to look over the matter and make any suggestions that he thought were right and proper for the protection of all of them, and as Mr. McMahon testifies, he supposed his duties were in the nature of arbitrator rather

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than anything else, he looked over the contracts and made two suggestions. One of them appears in the unsigned contract in lead pencil in his own handwriting, and the other I think was dictated by him, but reduced to writing by Mr. Ohmer. The thing went along until the matter was ready to sign. No suggestion was made at that time coming from any one of the three, so far as the testimony shows, that there was anything else to be added to the contract. It was in bad shape; some in lead pencil and some on one piece of paper and some on another, and it was scratched and interlined; and Mr. McMahon would not permit the matter to be signed. If an attempt had been made to sign it, so he testified, he would not have permitted a paper of that kind to go out of his office.

The suggestion was then made (and there is a dispute upon that point), the suggestion was made that the contract was all agreed to; that Ohmer should take it with him and have it run off by his typewriter, and then they should all appear at his office on the next morning and sign the contract. The suggestion had been made that it should be run off by the typewriter in Mr. McMahon's office, and he went to get his stenographer and found he was gone, and so far as the testimony shows they left the office. Mr. Ohmer, I think, did sign the rough contract. At any rate Tamplin says he agreed to sign the contract, if he was satisfied with it; said they wanted to look it over. Mr. McMahon, who was on the stand, and testified, says that so far as his memory goes nothing of that kind was said, and that he is quite sure that if he had said, after he made the suggestions that he did, that this contract was now ready to sign, they would have signed it, all of them. That is his view of the matter.

The contract was perfect in every respect—it contained all the essentials; there had been a meeting of the minds upon all of them; there was a valuable consideration; everything was done that could be done or ought to be done in order to make a complete contract, except the redrafting of the contract and the signing of the names.

There is where the contention in a very large degree comes in this case. It is insisted by the plaintiff that they did enter into a contract, and the mere fact that the contract was not signed that night at McMahon's office did not make any difference. They entered into the contract, promising to sign the contract the next morning, after it was put in legal form.

Neither Neth nor Tamplin appeared next morning to sign the contract, nor did they ever appear at Ohmer's office for that purpose. But Tamplin appeared next morning at Mr. McMahon's office, and asked him whether or not that was a binding contract. Mr. McMahon said to him that he thought the proper thing for him to do was to go

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and employ a lawyer; and that is the last we hear of Tamplin. A few days after that time, perhaps a day after that, Mr. Neth came to the office and said that he and Tamplin had a disagreement; that Tamplin was going to the other firm, and he (Neth) wanted to stay with Ohmer. The thing went on for a day or two, and Neth and Tamplin came and got their tools, and that was the end of the matter so far as this contract was concerned.

Now, the question presents itself: Is that a valid contract? It is admitted by the defendants to be valid in every respect but the signature—the mere fact that the contract was not signed.

If there had been an understanding between all the parties that evening—if the testimony showed that Mr. Ohmer and Neth and Tamplin agreed that that would not be a binding contract until signed, we would say, No, that is not a good contract; but the testimony does not disclose that fact. Both Tamplin and Neth admit that nothing of that kind was said while they were in McMahon's office; but they say that this conversation which they claim to have had with Mr. Ohmer was after they left Mr. Ohmer's office, that it was then they said they would be in to sign the contract, if they were satisfied with it. Mr. Ohmer denies it *in toto*.

In *Blaney v. Hoke*, 14 Ohio St. 292, the syllabus is as follows:

"1. Where an agreement, not within the purview of the statute of frauds, is in all other respects complete—and in the absence of any understanding between the parties that the same should not be complete until reduced to writing—the same will bind the parties, although it may have been understood between them that the agreement should afterward be formerly reduced to writing and executed.

"2. An agreement may be complete, although by its terms the obligations and rights of the parties may be made to depend on the terms of a contract to be subsequently entered into between one of the parties to the agreement and a third party."

This case clearly recognizes the rule that a contract can be a valid contract under certain circumstances without being signed at all. If the understanding of all the parties to the contract is to the effect that the contract must be signed after it is reduced to writing, then it would not be, as we understand this decision, a valid contract unless it was so signed. But suppose there was no understanding of that kind, or suppose that after the contract had been agreed to there was a separation of the parties, and nothing was said about signing this contract except that it should be signed in the morning, without any further consideration whatever, then I undertake to say, according to the principles of this case, that it did constitute a valid contract between the parties.

Another thing that strengthens the view of the court that these

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parties, Neth and Tamplin, recognized that as a valid contract, is the fact that they say—take their own statement, if you please—that “that is all right so far as we now know; we will come to your office tomorrow morning;” that Neth came back, and nothing was ever said about any other elements in that contract except those which had been reduced to writing. What does that indicate? It indicates that there was nothing in their claims at all. They agreed to sign it the next morning. They did not propose anything else. So far as one of the parties to the contract was concerned, he was never again heard of in his relations to Mr. Ohmer. He did go to McMahon’s office and a conversation took place as we have said. We think under the decision above cited and under the testimony in this case, that it constituted a contract between the plaintiff and defendants in this case.

The testimony in this case further shows that in May these same defendants, Neth and Tamplin, undertook to sell this patent or invention, whatever it may be, to a syndicate composed of William Breidenbaugh, George Weimer, Clarence Grier, Harry Wagner, James Muldoon and a man by the name of Carpenter, from Sidney. That they were very anxious to sell this same machine and represented to these men what it was worth, and they dickered backward and forward for some time and could not agree upon terms and the matter was given up. It cropped out from the testimony that the defendants in this case were very anxious to perfect that machine. Mr. Weimer testifies to this. He said they wanted to get this machine out before Ohmer got his No. 3 out; wanted to get their patent first, and they said, if we can believe Weimer, and we have no reason for not believing him, that they had fixed No. 3 so that that machine could not be got out for two or three months.

As a matter of fact, if Mr. Ohmer and Mr. Whistler tell the truth, somebody did fix No. 3, because it took the better part of three months to reassemble that machine after these gentlemen left, and they had to get some expert from Springfield and one from Pittsburg. It took them three months to reassemble No. 3 and put it in proper condition. If Weimer tells the truth, Neth admitted to him that they had done that very thing for the purpose of delaying Mr. Ohmer in getting out his model preparatory to getting a patent. It does not look right for a person to do that; much less a person who is engaged in business.

The testimony discloses the further fact that within two or three days immediately before this temporary restraining order was allowed, this machine, whatever it is, was sold to another competing firm here in town. The defendants, Neth and Tamplin, evidently took the view that they were under no obligation to carry out this contract with Will Ohmer. They therefore dropped their negotiations with him and went

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ahead, and as they testified, sold the identical improvement—that is the language of both of them—there is no difference between the machine that they wanted to sell to Will Ohmer and the one they wanted to sell to the Ohmer Car Fare Register Company.

The testimony further shows that they worked there from two and a half to three years. There is a total failure of the testimony to show that either of the defendants made any claim to have any interest as inventors or otherwise in machines No. 1, 2 and 3 until about the last of May or first of June, 1904, and there is nothing in the testimony to show that they had.

They did claim, I believe, to have done some work at the house. They also admitted they had done some work on Ohmer's time on this machine they were about to sell; that they had gone away, made several trips, and on one of them at least Ohmer was paying them for their time while they were working on this machine. One of them admits that to be true. He said he didn't think it was the right thing to do, but he was doing it all the same.

Now, that is substantially what we have in the case. Mr. Ohmer says that they have possession of all his secrets in reference to this matter and all the secrets in reference to another machine—what is called a ticket machine. According to his description it does everything but talk. It is truly a wonderful machine. He described the action of the machine, what it would do. The mechanism, of course, he did not; was not allowed to.

There was another thing that cropped out in this matter; that the United States Patent Commissioner does not pay much attention to an order of this kind anyhow. After Judge Brown had allowed a temporary restraining order in this case a patent was issued to Mr. Ohmer on No. 2. After a patent is issued the knowledge of it becomes public property; anybody can see then what is going on and what has been done. Then if anybody claims there is an infringement, he may bring a suit in the United States circuit court to test it. As testified in this case by Mr. Ohmer and not denied by defendants, some application that he had in the patent office for a patent on No. 2 was taken by the defendants in this case, and No. 2 was thrown into interference, so there is a contest on infringement before the patent commissioner.

After your patent is issued it seems to be nothing more than than *prima facie* evidence of title until it has been tested in the circuit court of the United States and thence on to the Supreme Court of the United States. It is not until then that a party can feel sure whether he has a patent.

Now, I say these things all came along at the time they quit. Up until that time the testimony does not show that there was any claim made for these inventions.

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What is the law on a case of this kind? There are three or four propositions of law. I will call your attention to them.

I believe it was first claimed that this court did not have jurisdiction; that this whole matter ought to be referred to the patent office. I am sorry that this is not the law of the case. But it has been held that a state court has jurisdiction to protect the rights of parties against the divulging of secrets, and to protect the rights of parties in reference to patents while a case is pending on a suit on infringement in the United States courts. The fact that the plaintiff would have a remedy in the circuit court of the United States for infringement of a patent, does not deprive him of his remedy in the state courts for the violation of the terms and conditions of a contract for the manufacture of such patent. *Gordon v. Deckebach*, 9 Dec. Re. 324 (12 Bull. 169). And we have exactly the same holding in the case of *Fuller & Johnson Mfg. Co. v. Bartlett*, 68 Wis. 73 [31 N. W. Rep. 747; 60 Am. St. Rep. 838].

According to these two authorities, we have jurisdiction in the matter, notwithstanding there may be infringement suits pending.

Now there is another proposition: That a court of equity will protect an inventor of a secret process against its disclosure by any one obtaining knowledge of it in confidence. I cite the well-known case of *Cincinnati Bell Foundry v. Dodds*, 10 Dec. Re. 154 (19 Bull. 84), decided by Judge Taft, where he lays down the proposition that—

“A court of equity will protect the inventor of a secret process against its disclosure or unauthorized use by any person obtaining knowledge of it in confidence.

“The inventor may sell the secret to another, and thereby vest in his assignee as full right to protection from disclosure or use by persons acquiring knowledge of it in confidence, as he himself would have.

“The process must be shown to be a secret in order to entitle the complainant to protection.”

We find the same doctrine, in the case of *Eastman Co. v. Reichenbach*, 47 N. Y. St. 183 (20 N. Y. Supp. 110), affirmed, no report, *Eastman Kodak Co. v. Reichenbach*, 79 Hun 183 [29 N. Y. Supp. 1143].

“The actual creative act of the inventor (is recognized as an invention), although he may have called to his assistance the ideas and creations of other parties, provided such ideas and creations are so used as to achieve new results.”

Here is another proposition:

“When, however, knowledge of such secret process is obtained by any breach of confidence, courts of equity will enjoin the use of such knowledge by parties acquiring the same in that manner.”

That decision shows that the right was perfectly clear for the power of a court of equity to be invoked for that purpose.

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What is the duty of the master and the servant? We find in *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, 108, what we think is applicable to a question of this kind.

What is the duty of the master to the servant or the servant towards the master? Under similar circumstances it seems to me that the principle which regulates the one, when the relationship of principal and agency is created, simply would regulate the other. Here was a question as to the relationship of principal and agent. The agent had been buying certain property while he was agent, and claimed it as his own. The Supreme Court of Ohio held that he was not entitled to it at all and that it belonged to the principal.

"It is a fundamental rule that an agent employed to sell cannot be a purchaser, unless he is known to his principal to be such; nor is the rule inapplicable or relaxed when the employment is to sell at a fixed price. *Ruckman v. Bergholz*, 37 N. J. L. 437. The law will not suffer one to earn a profit or expose him to the temptation of a dereliction of duty, by allowing him to act at the same time in the double capacity of agent and purchaser. *Church v. Marine Ins. Co.* 1 Mason 341."

Now, here is a general proposition, as said by Chancellor Walworth in *Van Epps v. Van Epps*, 9 Paige 237, 241:

"It is a rule which applies universally to all who come within its principle; which principle is, that no party can be permitted to purchase an interest in property and hold it for his own benefit, when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use."

Now, let us read that another way and see how it would apply to this case. See if there is any reason why it should not apply with all its force:

"It is a rule which applies universally to all who come within its principle, which principle is that no party can be permitted to claim an interest in property and hold it for his own benefit when he has a duty to perform in relation to such property which is inconsistent with the character of the claimant, on his own account and for his own individual use."

I say the principle is the same whether it reads the one way or the other.

There is still one more proposition in this case. It is not necessary to have a written contract in a case of this kind. The relationship once established, and an employe goes into the shop of an inventor and proprietor and is put to work on some inventive process, the law says that he cannot divulge that secret process, independent of any

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contract. The relationship is confidential; therefore the law raises a presumption that it shall be confidential. The law raises an implied contract that the employe who occupies a confidential relation towards his employer shall not divulge any trade secrets imparted to him nor discovered by him. *Sittle v. Gallus*, 4 Hun (1896) 569; *Eastman Co. v. Reichenbach*, 47 N. Y. St. 183 [20 N. Y. Supp. 110], affirmed, no report, *Eastman Kodak Co. v. Reichenbach*, 79 Hun 183 [29 N. Y. Supp. 1143]; *Peabody v. Norfolk*, 98 Mass. 452 [96 Am. Dec. 664].

There is only one more case I am going to call attention to, and that is the case of *Solomons v. United States*, 137 U. S. 342 [11 Sup. Ct. Rep. 88; 34 L. Ed. 667], a case that was decided in 1890. During 1867 and 1868 Spencer M. Clark was general superintendent of the Bureau of Engraving at Washington. The secretary of the treasury wanted some person to invent some kind of a stamp that would prevent frauds upon whiskey and liquor of all kinds. The subcommittee of the Ways and Means committee waited upon him, and finally there was a meeting arranged between the subcommittee, the secretary of the treasury and the internal revenue commissioner and Mr. Clark. They asked him if he could not devise some appliance by which these stamps would be effective to prevent all sorts of frauds by the reuse of the stamps. He said he thought he could do it, and went about to devise a stamp which would do the work. After he had devised it and before he applied for a patent upon the same, he sent for the secretary of the treasury and subcommittee and the revenue commissioner, and they thought it was a very good thing and they adopted it. Subsequent to that time Clark went home. While he was inventing this stamp he was still superintendent of the Bureau of Engraving and Printing, and said that he did not want anything for his invention; but finally he applied for a patent.

The case was decided by Mr. Justice Brewer. I will read part of the opinion to you. He says, page 345:

"The case presented by the foregoing facts is one not free from difficulties. The government has used the invention of Mr. Clark and has profited by such use. It was an invention of value. The claimant and appellant is the owner of such patent, and has never consented to its use by the government. From these facts, standing alone, an obligation on the part of the government to pay naturally arises. The government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate; nor does the mere fact that an inventor is at the time of his invention in the employ of the government transfer to it any title to or interest therein. An employe, performing all the duties assigned to him in his department of service, may exercise his inventive faculties

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in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property. There is no difference between the government and any other employer in this respect. *But this general rule is subject to these limitations: If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer.* [Italics, Judge Kumler's.] So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employes to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the co-employees of his employer, as to have given to such employer an irrevocable license to use such invention."

In this case the testimony of Mr. Ohmer shows and both of the defendants admitted on the stand, that they were employed for the purpose of inventing and making a car fare register, "or a means of accomplishing a prescribed result; he cannot after successfully accomplishing the work for which he was employed, plead title thereto as against his employer."

These two defendants now claim they were original inventors of these machines. Suppose they were, then what? "That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer."

This is the principle of law announced by Justice Brewer, the best judge, perhaps, that ever sat, at least on the present Supreme Bench of the United States. We are bound to bow our heads to this decision.

Without going further in this case, the holding of the court is that the temporary restraining order be made perpetual and a perpetual injunction is awarded.

Dorenkemper v. Traction Co.

DAMAGES—DEATH—NEGLIGENCE—STREET RAILWAYS.

[Hamilton Common Pleas, May 23, 1907.] *

JOSEPHINE DORENKEMPER, ADMX. v. CINCINNATI TRACTION CO.**1. PROVINCE OF JURY ON QUESTION OF CONTRIBUTORY NEGLIGENCE.**

Where the charge of the court makes it appear that the jury must have found the plaintiff's intestate was free from negligence and that the defendant was negligent, the fact that there is some doubt in the mind of the court as to the freedom of the intestate from negligence does not afford ground for setting aside the verdict.

[For other cases in point, see 6 Cyc. Dig., "Negligence," §§ 705-726.—Ed.]

2. ELEMENTS OF DAMAGES FOR DEATH BY WRONGFUL ACT.

In the absence of any evidence as to the earning power of the intestate, a jury is warranted in fixing the pecuniary damages resulting from his death by taking the minimum sum which a man of like age, health and ability to work could earn at manual labor, and adding thereto the pecuniary loss other than earning capacity resulting to his family.

[For other cases in point, see 3 Cyc. Dig., "Damages," §§ 711, 712; "Death," §§ 171-185.—Ed.]

3. MEASURE AND AMOUNT OF DAMAGE FOR DEATH FROM NEGLIGENCE.

As damages for the wrongful death of a butcher, thirty-nine years of age, in apparently reasonably good health but perhaps suffering from heart disease, leaving a widow and four children from seven to thirteen years of age, a verdict of \$6,000 would not be unreasonable.

[For other cases in point, see 3 Cyc. Dig., "Damages," §§ 1076-1148; "Death," §§ 186-188.—Ed.]

[Syllabus approved by the court.]

MOTION for new trial.

Horstman & Horstman, for plaintiff:

Cited and commented upon the following authorities: *Wabash Ry. v. De Tar*, 141 Fed. Rep. 932 [73 C. C. A. 166]; *Schweinfurth v. Railway*, 60 Ohio St. 215 [54 N. E. Rep. 89]; *Clev. C. & C. Ry. v. Crawford*, 24 Ohio St. 631 [15 Am. Rep. 633]; *Balt. & O. Ry. v. Whitacre*, 35 Ohio St. 627; *Cincinnati St. Ry. v. Altemeier*, 60 Ohio St. 10 [53 N. E. Rep. 300]; *Illinois Cent. Ry. v. Baches*, 55 Ill. 379; Black's Law & Practice in Accident Cases Sec. 254, 255; Tiffany, Death by Wrongful Act Secs. 158, 159, 160; *Balt. & O. Ry. v. State*, 24 Md. 271; *Kelley v. Railway*, 50 Wis. 381 [7 N. W. Rep. 291]; *Chicago & N. W. Ry. v. Whitton*, 80 U. S. (13 Wall.) 270 [20 L. Ed. 571]; Weekly Notes (Eng.) 1866, p. 134; *Delaware, L. & W. Ry. v. Jones*, 128 Pa. St. 308 [18 Atl. Rep. 330]; *Pennsylvania Ry. v. Goodman*, 62 Pa. St. 329; Elliott, Roads 655; Patterson's Ry. Acc. Law Sec. 406; *Dallas & W. Ry. v. Spicker*, 61 Tex. 427 [48 Am. Rep. 297]; *Kessler v. Smith*, 66 N. C. 154; *McHugh v. Schlosser*, 159 Pa. St. 480 [28 Atl. Rep. 291; 23 L. R. A. 574; 39 Am. St. Rep. 699]; *Hurst v. Railway*, 84 Mich. 546 [48 N. W. Rep. 44]; 2 Thompson, Negligence 12, 190; *James v. Railway*, 92 Ala. 231 [9 So. Rep. 335]; *Louisville & N. Ry. v. Orr*, 91 Ala. 548 [8 So. Rep.

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360]; *Chicago. P. & St. L. Ry. v. Woolridge*, 174 Ill. 330 [51 N. E. Rep. 701]; *Donaldson v. Railway*, 18 Iowa 280 [87 Am. Dec. 391]; *Eckerd v. Railway*, 70 Iowa 353 [30 N. W. Rep. 615]; *Reed v. Railway*, 57 Iowa 23 [10 N. W. Rep. 85]; *Andrews v. Railway*, 8 Circ. Dec. 584 (19 R. 699); *Potter v. Railway*, 22 Wis. 615; *Chicago v. Major*, 18 Ill. 349 [68 Am. Dec. 553]; *Grotenkemper v. Harris*, 25 Ohio St. 510.

Kittredge & Wilby, for defendant.

WOODMANSEE, J.

Josephine Dorenkemper, administratrix, files this suit against the Cincinnati Traction Company to recover damages for the wrongful death of her husband.

In her petition, plaintiff alleged negligence on the part of the defendant company in the operation of its cars, whereby her husband, Henry Dorenkemper, who was driving a horse and buggy on Harrison avenue, near the junction of said avenue with Westwood avenue, Cincinnati, was thrown from his buggy and about four months thereafter died from the injuries so received.

The defendant filed what is in effect a general denial.

The defendant claims that plaintiff's intestate was negligent and that defendant was free from negligence, and the question of contributory negligence did not enter into the case.

The jury returned a verdict in favor of the plaintiff for \$8,000 and defendant now asks to have the same set aside and for a new trial on the usual statutory grounds. In view of the instructions given to the jury by the court it is made to appear that the jury found from the evidence that plaintiff's intestate was free from negligence, and that the defendant was negligent.

The testimony showed that Dorenkemper was moving in the direction of an approaching car on the wrong side of the street, and the court instructed the jury that he had no right to cross the track in front of the approaching car unless he had reason to believe that he could clear the track before the car properly operated would reach him, and unless that belief was justified he was negligent in going upon the track at the time he was injured and no recovery could be had.

The jury found on all points in favor of the plaintiff.

While the court is convinced that there is some doubt as to whether the plaintiff's intestate was free from negligence, still the twelve jurors in this case found that he was and the court is not disposed to disturb their finding in this regard.

Counsel for defendant insists that the verdict is excessive and that the testimony in any event only warrants nominal damages.

Plaintiff's testimony showed that Dorenkemper was thirty-nine

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years of age, a butcher by trade, being in reasonably good health, and that he left a widow and four children—boys, ranging from seven to thirteen years of age.

No testimony was offered as to the income or earning capacity of Dorenkemper, and for this reason it is claimed that the jury had nothing on which to base its verdict.

Plaintiff's right to recover is not limited to the income of the decedent.

While we undertake to measure the pecuniary value of a parent to a child by dollars and cents, yet we must take into consideration all the pecuniary benefits that the child would probably have derived from such parent had he lived.

As this action is brought for the benefit of the widow and the children of the decedent, it follows that irrespective of income or earning ability the benefits to the children increase with the number of children (denied in some states). That is, each child is entitled to recover on its own account for the loss of pecuniary benefit, which means parental care and attention as well as financial aid.

"Damages are not confined to immediate loss of money to those for whose benefit the action is brought. The injury to the widow by the loss of her husband's care, protection, support and assistance may be considered in estimating damages." Thompson, Negligence Sec. 90.

If the plaintiff has shown by the evidence that Dorenkemper had the capacity to work, then in view of the law which compelled him to support his family, the jury would have the right to base the amount of damages at least upon the minimum sum which a man of like age, health and ability could earn at manual service.

This combined with pecuniary loss above mentioned other than earning capacity, would make up the sum total to which plaintiff would be entitled.

Based upon this theory of the case, which counsel for defendant will urge is entirely too liberal, the court, after careful deliberation, is of the opinion that the verdict of \$8,000 is excessive.

The Supreme Court of Illinois in a similar case of *Railway v. Weldon*, 52 Ill. 290, where a jury arbitrarily returned a verdict for \$5,000, held that it bore the appearance of being the result of prejudice and passion.

In coming to the conclusion that the verdict is excessive in this case, the court also takes into consideration the testimony relative to the physical condition of the deceased.

The greater number of the physicians who were called as witnesses were convinced that Dorenkemper was subject to heart disease; that he

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was a short lived man and even went so far as to say that death resulted from heart disease and that the injury complained of in this case only contributed to his death; that his death would likely have occurred at a day not far distant in the natural order of things.

The jury was instructed to take this into consideration in fixing the amount of its verdict.

Conceding all the doubtful points in favor of the plaintiff—that the defendant company was negligent; that Dorenkemper was free from negligence and that he died from the injury—yet in view of his physical condition and the fact that plaintiff offered no proof of his financial ability or earning capacity, the court is constrained to say that the verdict is excessive.

The court finds the record free from all other errors.

Had the verdict of the jury been for an amount not exceeding \$6,000, it would not have been disturbed upon his motion.

If counsel for plaintiff will consent to a remittitur of \$2,000 a judgment for \$6,000 will be entered; otherwise a new trial is granted.

GUARANTY—LANDLORD AND TENANT.

[Superior Court of Cincinnati, General Term, November 22, 1907.]

Hoffheimer, Swing and Woodmansee, JJ.

CHARLES BECKER ET AL. V. FRANCIS M. SHOEMAKER ET AL.

1. LESSOR'S TAKING KEY TO SHOW LEASED PREMISES TO PROSPECTIVE TENANT NOT ACCEPTANCE OF SURRENDER BY LESSEE.

Acceptance of surrender of leased premises is not effected by the landlord's agent getting the key from lessee for the purpose of showing the property to prospective tenant, especially, in view of the fact that the agent refused to accept the premises and insisted on holding the tenant for the rent for the remainder of the term.

2. GUARANTY TO PAY RENT PASSES UPON CONVEYANCE OF FEE TO GRANTEE.

A guaranty to pay rent to the original lessor of real property passes to grantees upon conveyance of the fee.

[Syllabus approved by the court.]

ERROR to special term.

Albert Bettinger, for plaintiffs in error:

Cited and commented upon the following authorities: Brandt, Sur. & Guar. 231; *Barns v. Barrow*, 61 N. Y. 39 [19 Am. Rep. 247]; Stearns, Suretyship p. 64, Sec. 52; p. 109, Sec. 78; *Jennings v. Throgmorton*, Ry. & M. 251; *Spurgeon v. McElwain*, 6 Ohio 442 [27 Am. Dec. 266]; 2 Taylor, Landl. & Ten. 125, Sec. 521; Jones, Landl. & Ten. Secs. 120 to 125; 2 Wood, Landl. & Ten. 1341, Sec. 549; *American Strawboard Co.*

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v. *Strawboard Co.* 65 Ill. App. 502; *McDonald v. Tree*, 69 Ill. App. 134; *Harris v. McDonald*, 79 Ill. App. 638; *Holmead v. Maddox*, 2 Cranch C. C. 161 [12 Fed. Cas. 391]; *Mound v. Barker*, 71 Vermont 253 [44 Atl. Rep. 346; 76 Am. St. Rep. 768]; *Simpson v. Wood*, 105 Mass. 263; *Smith v. White*, L. R. 1 Eq. 626; *Updike v. Campbell*, 4 E. D. Smith (N. Y.) 570; *Edelmuth v. McGarren*, 4 Daly (N. Y.) 467; *Dougherty v. Seymour*, 16 Colo. 289 [26 Pac. Rep. 823]; *Ralston v. Boady*, 20 Ga. 449; *Ashbrook v. Dale*, 27 Mo. App. 649; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459 [23 S. W. Rep. 294]; *Vanbuskirk v. McNaughton*, 34 New Br. 125; *Zink v. Grant*, 25 Ohio St. 352; 1 Page, Contracts 828, Secs. 532, 533; *Allen v. Keilly*, 18 R. I. 197 [30 Atl. Rep. 965]; *Langton v. Hughes*, 1 Maul. & Sel. 593; *Terre Haute Brew. Co. v. Hartman*, 19 Ind. App. 596 [49 N. E. Rep. 864]; *Tracy v. Talmage*, 14 N. Y. 162; *Sondheim v. Gilbert*, 117 Ind. 71 [18 N. E. Rep. 687; 5 L. R. A. 432; 10 Am. St. Rep. 23]; *Chateau v. Singla*, 114 Cal. 91 [45 Pac. Rep. 1015; 33 L. R. A. 750; 55 Am. St. Rep. 63]; *Ernst v. Crosby*, 140 N. Y. 364 [35 N. E. Rep. 603]; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459 [23 S. W. Rep. 294]; *Sprague v. Rooney*, 82 Mo. 493 [52 Am. Rep. 383]; *Armfield v. Tate*, 26 N. C. (7 Ired.) 258; *Ashbrook v. Dale*, 27 Mo. App. 649; *Jones Landl. & Ten.* 487, 656; 2 Taylor, Landl. & Ten. Sec. 425; 2 Platt, Leases 386; *Abbott v. Hills*, 158 Mass. 396 [33 N. E. Rep. 592]; *Roberts v. Carter*, 24 How. Pr. 44; *Barrow v. Bispham*, 11 N. J. Law 110; *Murray v. Gouverneur*, 2 Johns. Cas. 438; Mechem, Agency Sec. 743; Huffcut. Agency 194; Story, Agency 151, 152; *Cowen v. Sunderland*, 145 Mass. 363 [14 N. E. Rep. 117; 1 Am. St. Rep. 469]; *Myers v. Rosenback*, 13 Misc. (N. Y.) 145 [34 N. Y. Supp. 63]; *Pursel v. Peller*, 10 Colo. App. 488 [51 Pac. Rep. 436]; *Blake v. Ranous*, 25 Ill. App. 486; *Jackson v. O'Dell*, 12 Daly (N. Y.) 345; *Moore v. Parker*, 63 Kan. 52 [64 Pac. Rep. 975]; *Wallace v. Lent*, 1 Daly (N. Y.) 481; *Hines v. Willcox*, 96 Tenn. 328 [34 S. W. Rep. 420; 34 L. R. A. 832]; *Willcox v. Hines*, 100 Tenn. 538 [41 L. R. A. 278; 66 Am. St. Rep. 770]; *Staples v. Anderson*, 3 Rob. (N. Y.) 327; 2 Woodfall, Landl. & Ten. (2 ed.) 1292; *Shinkle v. Birney*, 68 Ohio St. 328 [67 N. E. Rep. 715]; *Thum v. Rhodes*, 12 Colo. App. 245 [55 Pac. Rep. 264]; *Utah Optical Co. v. Keith*, 18 Utah 464 [56 Pac. Rep. 155]; *Winton v. Cornish*, 5 Ohio 477; 20 Cyc. of Law & Proc. 1434; *Hayden v. Weldon*, 43 N. J. Law 128 [39 Am. Rep. 551]; *Barlow v. Myers*, 64 N. Y. 41 [21 Am. Rep. 582]; *Briggs v. Latham*, 36 Kan. 205 [13 Pac. Rep. 129]; *Eastern Townships Bank v. Railway*, 40 Fed. Rep. 423; *Central Trust Co. v. Bank*, 101 U. S. 68 [25 L. Ed. 876]; *Tuttle v. Bartholomew*, 12 Metc. (Mass.) 452; Stearns, Suretyship 63; 14 Am. & Eng. Enc. Law 1157; *Leibschutz v. Black*, 16 Dec. 473; *Thompson-Houston Elec. Co. v. Improvement Co.* 53 N. Y. 467 [23 N. Y. Supp. 900]; *Stoefel v. Rothschild*, 64 App. Div. 293 [72 N. Y. Supp. 171].

Superior Court of Cincinnati.

C. B. Wilby, for defendants in error.

WOODMANSEE, J.

This suit was filed to recover rent upon a written lease for a term of five years. It is sought to hold certain defendants for the rent upon a written guarantee that was given to the lessor at the time of making the lease. The tenant left the premises at the end of three years and this suit is to recover rent for the remainder of the term from the tenant and his guarantors.

The record discloses that the original lessor sold the premises subject to the lease to the defendants in error. The guarantors demurred to the petition on the ground that the guaranty did not pass to the defendants in error by the conveyance of the fee, but we hold with the trial judge that it did and that there was no error in overruling the demurrer.

An amended answer was filed and plaintiff demurred to the second defense, which was sustained, and upon motion the third defense was stricken from the amended answer, in neither of which rulings of the court do we find error.

The case finally went to trial upon the petition, the second amended answer and the reply. Various exceptions were taken to the exclusion of certain testimony offered by the defendants above, but we find that the rulings of the court upon the motions did substantial justice to both parties.

As to whether the court erred in charging the jury to bring in a verdict for the plaintiffs below, it must be determined whether there was a surrender of the premises by the tenant to the landlord and whether such surrender was accepted by defendants in error, either personally or by their authorized agents. This is now the only vital issue, for we hold that the testimony does not disclose an eviction or any thing tantamount thereto.

The tenant testified that he delivered the key of the premises to defendant's authorized agent. The tenant's testimony admits that such agent refused to accept the key. Later the agent got the key for the purpose of showing the property to a prospective tenant, and this is claimed as an acceptance by counsel for plaintiffs in error.

But it must be conceded that any such intent is rebutted by the testimony of the tenant himself. The tenant testifies on page 31 of the bill of exceptions, that the agent when he called for the key, said: "Let me have the key; I want to take somebody up there and show them the place." And the only testimony in the case relating to what was said by the agent at any time on this subject was that he refused to accept the premises and insisted on holding the tenant for the rent.

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Subsequent to this alleged surrender an agreement was made between the parties that the landlord should make an effort to secure a tenant, which effort would in no way affect the rights of the parties under the lease.

We find that there was no testimony disclosing a surrender of the premises and its acceptance by the owners or their authorized agent, and the trial judge therefore properly instructed the jury to render a verdict for plaintiffs.

This being our view of the case all other errors assigned relative to the instructions to the jury, either in giving or refusing to give certain charges, are in no way important, for the charge stands simply as a direction to the jury to find for the plaintiffs below.

Judgment affirmed.

ASSIGNMENTS.

[Licking Common Pleas, January Term, 1907.]

***R. L. TANEYHILL V. BALTIMORE & OHIO RY.**

VALIDITY OF ASSIGNMENT OF PART OF A CLAIM.

An assignment of a claim is not rendered invalid by reason of the fact that it includes only a part of the amount due from the debtor to the assignor. The remedy of the assignee of such a claim is not in an action at law, but in an action in equity.

R. L. Taneyhill, *pro se*.

Kibler & Montgomery, for defendant.

SEWARD, J. (Orally.)

This is a suit for five dollars brought by R. L. Taneyhill against the Baltimore & Ohio Ry. Company, and while there is not much involved as to money value, there is a principle involved in the case, and that is the reason the parties are litigating this case, I presume.

It is the question as to whether Taneyhill can bring this action and prosecute it to judgment—an action at law against the Balt. & O. Ry. Co. where only a part of the claim that was owing by the B. & O. railroad to the assignor of Taneyhill was assigned. Taneyhill procured an assignment for five dollars from a creditor of the Balt. & O. Ry. Co. who was working for the company, when there was about twenty-nine dollars due the assignor. He assigned to Taneyhill five dollars. Taneyhill sent a registered letter to the company, notifying them of this assignment. There isn't any question in the mind of the court but what the creditor of the B. & O. Ry. Co. had a perfect right to make this assignment.

*Affirmed by the circuit court, without report.

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The only question that confronts the court is whether Mr. Taneyhill has a right to pursue his remedy at law. The court does not think he has. The court is cited to *Welsh v. Childs*, 17 Ohio St. 319, which holds that he has a right in equity to pursue the remedy. *Pittsburgh, C. C. & St. L. Ry. v. Volkert*, 58 Ohio St. 362 [50 N. E. Rep. 924], holds the same way. The assignment of the claim is perfect, but the assignee has no right, as the court views it, to pursue his remedy at law, but is relegated to his remedy in equity, if any there is; and there may be a judgment for the defendant.

WILLS—WITNESSES.

[Licking Common Pleas, April Term, 1908.]

JOSEPH B. WILSON V. FRANK WILSON ET AL.

1. DEEDS EXECUTED BY TESTATOR, EVIDENCE OF CAPACITY TO MAKE WILL.

Deeds executed by a testator may be admitted in evidence in an action to set aside his will, where the purpose is to throw light on the mental capacity of the testator by showing his method of transacting business and the nature of the business transacted by him at about the time of the making of the will.

2. DEVISEE COMPETENT WITNESS AS TO ACTS OF TESTATOR.

A plaintiff in a will contest, although a son of the testator and a devisee under the will, is a competent witness to testify to acts of the testator and the manner in which those acts were performed.

[Syllabus approved by the court.]

Kibler & Montgomery, for plaintiff.

Albert Stasel and Flory & Flory, for defendant.

SEWARD, J. (Orally.)

This case is submitted to the court upon a motion for a new trial. It is an action brought to contest the will of James P. Wilson. It was tried to a jury, and resulted in a verdict setting aside the will of James P. Wilson. The charges made in the petition are undue influence and mental incapacity. The grounds of the motion for a new trial are, first, for errors in the charge; second, error in the exclusion of a deed, which was offered in evidence, and was excluded because it was not shown to have been executed by James P. Wilson; third, for permitting the plaintiff to testify as to the mental capacity of the testator.

Several deeds were permitted to go to the jury, simply for the purpose of showing that James P. Wilson had been transacting business, and the nature of the business; what he did at that time, and how the business was transacted. What he did might reflect upon his mental

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capacity, and the court permitted his acts to go to the jury for that purpose alone. One deed to a man named Stare, I believe, was offered in evidence. Objection was raised to the introduction of that deed; in fact, objections to all of these deeds were made, first, for reasons that they were incompetent in any view of the case. The court did not think that was so; it thought the deeds were competent to show the nature of the business he was transacting, and how he transacted it, whether as a sane and mentally capacitated man would transact such business or not. Objection was made to the last deed, because it was not shown that it was executed by James P. Wilson. The record of that deed was introduced in evidence, and it is claimed now, and I think well claimed, that, if there is a record of the deed, duly recorded in the recorder's office, proof of its execution is not necessary; and while the court thinks that, possibly, there was an error in refusing to permit the deed to go in evidence, still the testimony was purely cumulative. Several other deeds were introduced in evidence, to the same import, and for the same purpose, and the court thinks the testimony was purely cumulative; and it does not think the verdict ought to be set aside for that reason.

As to the first ground of error, the charge of the court, it is claimed that the court should have charged the jury that they must not only find by a preponderance of the evidence, but that there must be sufficient evidence introduced to overcome the *prima facie* case made by the introduction of the will and its probate. And the Supreme Court has so held in the recent case of *Hall v. Hall*, 78 Ohio St. 415. There is no complaint but what the court stated the law properly as far as it went, but it is claimed that it should have gone further, and stated that there must not only be a preponderance of the evidence, but sufficient evidence to overcome the *prima facie* case made by the introduction of the probate of the will. This is the entry of the Supreme Court:

“This cause came on to be heard upon the transcript of the record of the circuit court of Hamilton county, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be and the same is hereby reversed, for the reason that the charge to the jury is misleading and erroneous in that it nowhere distinctly states nor sufficiently emphasizes that the order of probate of the will, by the probate court, raises a presumption that the will so probated is the valid will and testament of Mercy A. Hall; that the court did not clearly explain to the jury the legal effect of the provision of the statute, ‘That the order of probate shall be *prima facie* evidence of due attestation, execution and validity of the will or codicil.’ ”

It is claimed that the court did not do that in this case. That the jury was not instructed, as they should have been instructed, that the

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order of probate of the will raises a presumption that the will so probated is the valid will and testament of James P. Wilson.

Now, let us see about that. I think the court gave that in that exact language, or with a slight variation. The court said to the jury, before the argument:

“Capacity to make a will requires that James P. Wilson, at the time the will was made, possessed sufficient mind to know and understand what he was doing, and sufficient mental capacity to know and understand the nature and extent of his property, and the persons who would naturally be the objects of his bounty, and that he was able to keep those things in mind long enough to form a rational judgment in regard to them.”

It was given after the argument, too:

“You are instructed that the order of the probate of this will is *prima facie* evidence of the due attestation, execution and validity of such will, and before the jury is entitled to return a verdict setting aside the will, they must be able to find that the evidence adduced by the plaintiff outweighs both the evidence adduced by the defendants and the presumption arising from the order of the probate court admitting the will to probate as the valid last will and testament of James P. Wilson.”

So, that identical proposition went to the jury before the argument, and went to them, in their retirement, in writing.

Now, as to the question of permitting Joseph B. Wilson, the plaintiff, who was interested as a legatee, to testify as to the mental capacity of his father, the testator. It is claimed that the court erred in permitting him to testify as to his condition. The court is cited to Thompson, Trial Ev. Sec. 1115, in which it is said:

“The adjudicated cases differ upon the rule as to the admissibility of declarations of a devisee or legatee as to the mental incapacity of the testator, where such declarations may affect others not in privity with such devisee or legatee. In speaking of the rule as to the admissibility of declarations made by one of several parties to the record, Mr. Greenleaf says: ‘Nor are the admissions of one of several devisees or legatees admissible to impeach the validity of a will, where they may affect others not in privity with him.’”

“The judge of a common pleas court in the case stating the rule from Mr. Greenleaf further said: ‘I think an examination of the most carefully considered cases will show that the declarations of a devisee or legatee in disparagement of the testator’s capacity—not made in the presence of other devisees and legatees who are interested in sustaining the will, nor in the presence of the testator—can not be offered by the party seeking to set aside the will in an action to try its validity;

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nor will the fact that the declarations were made in the lifetime of the testator by a member of his family, who is a party defendant, make any difference.' ”

I am also cited to the *Thompson v. Thompson*, 13 Ohio St. 356, which is to the same effect :

“On the trial of an issue in a proceeding under the statute, to contest the validity of a will, declarations, in reference to the mental capacity of the testator, of a legatee or devisee who is a party defendant to the proceeding, are not admissible in evidence to impeach the will, where there are other devisees or legatees whose interests may be injuriously affected by the admissions of such evidence.”

In both of these cases, in *Thompson*, Trial Ev., and in *Thompson v. Thompson*, *supra*, they attempted to prove declarations made by the party on the witness stand—a declaration that he had made before as to the mental capacity of the testator. Now, the court thinks there is a distinction between a declaration and the testimony of a witness given on the stand.

Section 5242 Rev. Stat. Par. 8. “Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plain-
involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not

So, there is an exception there, and a party may testify concerning a deed, will or codicil.

But we are not without some authority on that proposition. The case of *Wolf v. Powner*, 30 Ohio St. 472, was not cited by counsel on either side. In that case the Supreme Court has construed Sec. 342, which was originally Sec. 313. It was a contest of a will.

“Section 313 of the code of civil procedure, as amended May 2, 1871 (68 O. L. 127; 3 Sayler 2531; Sec. 5242 Rev. Stat.), did not make the husband of an heir, who was joined with her as a plaintiff, in an issue of *deixavit vel non*, incompetent as a witness for the contestants.”

Now, while the Supreme Court decides this case on the ground that the husband, who was called as a witness to testify, was not a real party in interest, and therefore not incompetent to be a witness in the case, the Supreme Court goes further in relation to the matter. It was Louis Wolf who was called. In deciding the case, Scott, J., says:

“Had Louis Wolf been an interested heir, and as such been a party plaintiff, his right to testify would have been unquestionable, by the very words of the proviso. Neither his interest as a party, or otherwise, would have rendered him incompetent. But it is said he was not an heir, and had no direct interest in the issue on trial. To which we answer, *a fortiori*, he might testify. The legislature has guarded against

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an erroneous construction of which it was thought the language might be susceptible, but did not think it necessary to go further, and guard against a construction every way unreasonable. Having said the section should not be so construed as to prevent parties most deeply and directly interested in the issue from testifying, it was not thought necessary to guard against a construction which would exclude witnesses who might have a remote or contingent interest, or no interest whatever in the controversy, if they should happen to be made parties on the record."

"Speaking for myself alone, I should be very strongly inclined to hold, that even if no such proviso were found in this section, it would be a perversion of its purpose to apply its inhibition to *any party* to an issue of *devisavit vel non*. The reason and policy of the section are obvious. The persons entitled to claim its protection are an actual executor or administrator of a deceased person, or the actual heir, grantee, or devisee of a deceased person, who is claiming, or defending against a claim made against him, as such."

To the same effect is *Murdock (Tr.) v. McNeely*, 1 Circ. Dec. 9, 10 (1 R. 16). This was an action brought against a trustee under a will:

"An objection, therefore, interposed to a competent witness, before he testifies at all, is premature, and is properly overruled by the court. The party desiring to object must wait and see what it is proposed the witness shall say, and if it is not allowable for him to testify as to such matters, the objection can then properly be made. But in a case like the one at bar, as we understand it, the section referred to, in effect, provides, that parties to the action stand on the same footing as other witnesses. It states expressly that the provisions of the section shall not apply to actions or proceedings involving the validity of a deed or will, and such we think is this case. This construction was put upon this statute by the district court of Greene county, some years ago, and exception having been taken to the ruling, the Supreme Court either refused leave to file a petition in error, or affirmed the judgment without reporting the case fully."

So that the court thinks that the plaintiff in the case, although a legatee or devisee under the will, was a competent witness to testify to acts of his father, and as to his mental capacity, as based upon what he saw his father do, and how he saw him act. And while the court does not agree with the jury in this case—the court would have found a different verdict from what the jury did—it is not in the province of the court to set aside the verdict unless there has intervened error which was prejudicial.

The court does not think any such error intervened. I am free to say that I do not agree with the jury in their finding in the case, but that is neither here nor there.

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TELEGRAPHS AND TELEPHONES.

[Allen Common Pleas, July 28, 1908.]

UNITED STATES TEL. CO. v. DELPHOS HOME TEL. CO.

INJUNCTION LIES TO RESTRAIN LOCAL EXCHANGE FROM VIOLATING CONTRACT FOR EXCLUSIVE TOLL BUSINESS.

A contract between a telephone company, organized to construct and operate toll lines, and a company operating a local exchange, having no toll connections, by which the former is to connect with the local exchange, and have the exclusive toll business thereof for a period of ninety-nine years, is not against public policy as tending to create a monopoly and injunction will lie to restrain such local exchange from giving toll business to any other company, especially since the toll company had been to great expense in constructing its lines and carrying out the provisions of its contract, and its rates are reasonable.

[Syllabus approved by the court.]

Clarence Brown and Cable & Parmenter, for plaintiff.

J. F. Lindemann, J. W. Warrington, W. B. Mann and D. K. Tone, for defendant:

The contract bearing date April 8, 1899, between the United States Company and the Delphos Company is contrary to public policy and void, because it tends to create a monopoly and also prohibits the Delphos Company from discharging the obligations which the latter company owes to the public. *Cleveland & M. Ry. v. Furnace Co.* 37 Ohio St. 321 [41 Am. Rep. 509]; *State v. Telephone Co.* 36 Ohio St. 296 [38 Am. Rep. 583]; *Thomas v. Railway*, 101 U. S. 71 [25 L. Ed. 950]; *Gibbs v. Gas Co.* 130 U. S. 396 [9 Sup. Ct. Rep. 553; 32 L. Ed. 979]; *Chicago Gas-Light & C. Co. v. Gas-Light & C. Co.* 121 Ill. 530 [13 N. E. Rep. 169; 2 Am. St. Rep. 124]; *South Chicago City Ry. v. Railway*, 171 Ill. 391 [49 N. E. Rep. 576]; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438 [56 N. E. Rep. 822; 48 L. R. A. 568; 75 Am. St. Rep. 184]; *West Virginia Transp. Co. v. Pipe Line Co.* 22 W. Va. 600 [46 Am. Rep. 527]; *Commercial Union Tel. Co. v. Telephone & Telegraph Co.* 61 Vt. 241 [17 Atl. Rep. 1071; 5 L. R. A. 161; 15 Am. St. Rep. 893]; *Charleston Gas Co. v. Gas Co.* 58 W. Va. 22 [50 S. E. Rep. 876; 112 Am. St. Rep. 936]; *Pacific Postal Tel. Cable Co. v. Telegraph Co.* 50 Fed. Rep. 493; *Cumberland Tel. & Tel. Co. v. Railway*, 51 La. Ann. 29 [24 S. Rep. 803; 72 Am. St. Rep. 442]; *Union L. & Exp. Co. v. Railway*, 37 N. J. Law 23; *Crawford v. Wick*, 18 Ohio St. 190 [98 Am. Dec. 103]; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596 [49 N. E. Rep. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736]; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Arnot v. Coal Co.* 68 N. Y. 558; *Harding v. Glucose Co.* 182 Ill. 551 [55 N. E. Rep. 577; 64 L. R. A. 738; 74 Am. St. Rep. 189]; *John D. Parks & Sons Co. v. Hartman*,

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153 Fed. Rep. 24; *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* 148 Fed. Rep. 939 [78 C. C. A. 567]; *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615); *Atchison, T. & S. F. Ry. v. Railway*, 110 U. S. 667 [4 Sup. Ct. Rep. 185; 28 L. Ed. 291]; *Memphis & Little Rock Ry. v. Express Co.* 117 U. S. 1 [6 Sup. Ct. Rep. 542; 29 L. Ed. 791]; *Chicago, St. L. & N. O. Ry. v. Car Co.* 139 U. S. 79 [11 Sup. Ct. Rep. 490; 35 L. Ed. 97]; *Wiggins Ferry Co. v. Railway*, 73 Mo. 389 [39 Am. Rep. 519]; *Crawford v. Wick*, 18 Ohio St. 190 [98 Am. Dec. 103]; *Scofield v. Railway*, 43 Ohio St. 571 [3 N. E. Rep. 907; 54 Am. Rep. 846];

The contract between the Delphos Company and the United States Company cannot be specifically enforced in a court of equity: (a) Because it is lacking in mutuality; (b) Because it involves the supervision by the court of the operation of a telephone exchange and the fixing of telephone rates for ninety-nine years; (c) Because the contract is oppressive, unreasonable and unjust. *Port Clinton Ry. v. Railway*, 13 Ohio St. 544; *Steinau v. Gas Co.* 48 Ohio St. 324 [27 N. E. Rep. 545]; *Rutland Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339 [19 L. Ed. 955]; 2 High, Injunction (4 ed.) 1093, 1096 Sec. 1109; *General Electric Co. v. Electric & Mfg. Co.* 144 Fed. Rep. 458; *Tiffin v. Shawhan*, 43 Ohio St. 178 [1 N. E. Rep. 581]; *Hughes v. Roth*, 7 Circ. Dec. 441 (18 R. 804); *Eleventh St. Church v. Pennington*, 10 Circ. Dec. 74 (18 R. 408); 4 Pomeroy, Equity Sec. 1405; *Koch v. Streuter*, 232 Ill. 594 [83 N. E. Rep. 1072].

1. The contract bearing date April 1, 1899, between the United States Company and the Delphos Company is void and contrary to public policy, because it tends to stifle competition, promote a monopoly, and prohibits the Delphos Company from discharging the duties which it owes to the public. *State v. Telephone Co.* 36 Ohio St. 296 [38 Am. Rep. 583]; *Cleveland & M. Ry. v. Furnace Co.* 37 Ohio St. 321 [41 Am. Rep. 509]; *Cumberland Tel. & Tel. Co. v. Railway*, 51 La. Ann. 29 [24 So. Rep. 803; 72 Am. St. Rep. 442]; *Chicago Gas-Light & C. Co. v. Gas-Light & C. Co.* 121 Ill. 530 [13 N. E. Rep. 169; 2 Am. St. Rep. 124]; *Thomas v. Railway*, 101 U. S. 71 [25 L. Ed. 950]; *Gibbs v. Gas Co.* 130 U. S. 396 [9 Sup. Ct. Rep. 553; 32 L. Ed. 979]; *West Virginia Transp. Co. v. Pipe Line Co.* 22 W. Va. 600 [46 Am. Rep. 527]; *Western Union Tel. Co. v. Telephone & Telegraph Co.* 61 Vt. 241 [47 Atl. Rep. 1071; 5 L. R. A. 161; 15 Am. St. Rep. 893]; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438 [56 N. E. Rep. 822; 48 L. R. A. 568; 75 Am. St. Rep. 184]; *Matthews v. Associated Press*, 136 N. Y. 333 [32 N. E. Rep. 981]; *State v. Associated Press*, 159 Mo. 410 [60 S. W. Rep. 91; 81 Am. St. Rep. 368; 51 L. R. A. 151]; *Diamond Match Co. v. Roeber*, 106 N. Y. 473 [13 N. E. Rep. 419; 60 Am. Rep. 464]; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596 [49 N. E. Rep. 1030; 41 L. R. A. 185;

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63 Am. St. Rep. 736]; *Charleston Gas Co. v. Gas Co.* 58 W. Va. 22 [50 S. E. Rep. 876; 112 Am. St. Rep. 936]; *South Chicago City Ry. v. Railway*, 171 Ill. 391 [49 N. E. Rep. 576]; *Pacific Postal Tel. Cable Co. v. Telegraph Co.* 50 Fed. Rep. 493; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Harding v. Glucose Co.* 182 Ill. 551 [55 N. E. Rep. 577; 64 L. R. A. 738; 74 Am. St. Rep. 189]; *J. D. Parks & Sons Co. v. Hartman*, 153 Fed. Rep. 24; *Continental Wall Paper Co. v. Voight & Sons Co.* 148 Fed. Rep. 939 [78 C. C. A. 567]; *Field Cordage Co. v. Cordage Co.* 3 Circ. Dec. 613 (6 R. 615); *Atchison, T. & S. F. Ry. v. Railway*, 110 U. S. 667 [4 Sup. Ct. Rep. 185; 28 L. Ed. 291]; *Memphis & Little Rock Ry. v. Express Co.* 117 U. S. 1 [6 Sup. Ct. Rep. 542; 29 L. Ed. 791]; *Chicago, St. L. & N. O. Ry. v. Car Co.* 139 U. S. 79 [11 Sup. Ct. Rep. 490; 35 L. Ed. 97]; *Wiggins Ferry Co. v. Railway*, 73 Mo. 389 [39 Am. Rep. 519]; *Carroll v. Campbell*, 108 Mo. 550 [17 S. W. Rep. 884]; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Crawford v. Wick*, 18 Ohio St. 190 [98 Am. Dec. 103]; *Scofield v. Railway*, 43 Ohio St. 571 [3 N. E. Rep. 907; 54 Am. Rep. 846].

The contract of April 1, 1899, is contrary to public policy and void. *State v. Telephone Co.* 36 Ohio St. 296 [38 Am. Rep. 583]; *Cleveland & M. Ry. v. Furnace Co.* 37 Ohio St. 321 [41 Am. Rep. 509]; *Matthews v. Associated Press*, 136 N. Y. 333 [32 N. E. Rep. 981]; *Diamond Match Co. v. Roeber*, 106 N. Y. 473 [13 N. E. Rep. 419; 60 Am. Rep. 464]; *State v. Associated Press*, 159 Mo. 410 [60 S. W. Rep. 91; 51 L. R. A. 151; 81 Am. St. Rep. 368].

The cases cited by defendant's counsel do not hold that contracts like the one here in question are valid and enforceable. The principal cases cited and relied upon by defendant's counsel are the following: *Carroll v. Campbell*, 108 Mo. 550 [17 S. W. Rep. 884]; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560.

The public policy of the state of Ohio, as expressed in its constitution, its laws and its judicial decisions, is that all contracts which have a tendency to stifle competition and to injure the public are null and void. *Diamond Match Co. v. Roeber*, 106 N. Y. 473 [13 N. E. Rep. 419; 60 Am. Rep. 464].

2. The contract between the Delphos Company and the United States Company cannot be enforced; first, because the contract is lacking in mutuality, and because enforcing it would involve the continuing supervision by the court of the operation of a telephone exchange and the fixing of telephone rates for ninety-nine years; second, because the contract is oppressive, unreasonable and unjust.

The contract between the Delphos Company and the United States Company is so oppressive, inequitable and unjust that a court of equity

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will not award the specific performance of it, even should we concede that such contract is valid.

No question of public policy was before the court in the cases relied upon by plaintiff's counsel. *People v. Telephone Co.* 19 Abb. N. C. 466; *Wood v. Whitehead Bros. Co.* 165 N. Y. 545 [59 N. E. Rep. 357]; *Bras v. McConnell*, 114 Iowa 401 [87 N. W. Rep. 290]; *Louisville & N. Ry. v. Coal Co.* 111 Ky. 960 [64 S. W. Rep. 969; 55 L. R. A. 601; 98 Am. St. Rep. 447]; *State v. Associated Press*, 159 Mo. 410 [60 S. W. Rep. 91; 51 L. R. A. 151; 81 Am. St. Rep. 368].

The argument that a monopoly may lawfully be built up for the purpose of crushing a monopoly is untenable.

Counsel's contention that the suit filed by the United States Company is one to enjoin a trespass and not for the specific performance of a contract is clearly untenable. 1 Pomeroy, Eq. Rem. Sec. 271; *Welty v. Jacobs*, 171 Ill. 624 [49 N. E. Rep. 723; 40 L. R. A. 98]; *Berliner Gramophone Co. v. Seaman*, 110 Fed. Rep. 30 [49 C. C. A. 99].

QUAIL, J.

The plaintiff in this case heretofore secured in this court a temporary injunction and this cause was submitted to this court upon a motion to dissolve the temporary injunction heretofore granted by the court.

The basis upon which the plaintiff secured the temporary restraining order is by virtue of a contract entered into by and between the plaintiff and the defendant, said contract having in view the transmission of long distance telephone communications between the exchange of the defendant company and this plaintiff, the plaintiff in this action being an incorporation organized and existing under the laws of the state of Ohio and being organized for the purpose of constructing, purchasing, acquiring, owning and operating toll lines for the transmission of telephonic communications from and to various cities, towns, villages and points within and beyond the state of Ohio, and to connect said toll lines with telephone exchanges and telephone devices in said several places.

The defendant in this action is a corporation which was organized for the purpose of acquiring, constructing, owning and operating telephone exchange in the village of Delphos, Ohio, and to supply telephone service to the people of Delphos and locality.

In its petition the plaintiff alleges that the said defendant, in violation of said contract entered into by, and between, the plaintiff and defendant on April 1, 1899, by virtue of which contract the said plaintiff was to have all the long distance business received by said defendant company, had connected its said telephone exchange and system with the telephone lines and system of the Central Union Telephone Company and

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the system and telephones, commonly known as the Bell system, whereby the said defendant is enabled to, and does, transmit messages over, and from, said system and to cities, villages and points which are reached and connected by the lines and system and connecting lines of the plaintiff.

Briefly stated, after the organization of the defendant company for the purposes of acquiring, constructing, owning and operating a telephone exchange in the village of Delphos, Ohio, to supply telephone service to the people of Delphos and locality, and after the said defendant had constructed said system and had placed said exchange in operation, thus forming means of communication to the people of Delphos, the said defendant company desired to afford to its patrons and subscribers the means of sending long distance communications from its exchange over some toll line system or long distance system. At that date the only toll line system of any importance was the long distance toll lines owned and operated by the Central Union Telephone Company, said company being the company that plaintiff complains, at the time of filing the petition, of having connected its said lines with the said defendant company's lines. At that time the said long distance telephone company hereafter known as the Central Union Company refused to connect its toll line with the exchange of the defendant company except upon such terms as they saw fit at that time to dictate; that said terms were such as to be wholly without the reach of the said defendant company. This was the situation that existed prior to April 1, 1899, the date of the contract between the plaintiff and the defendant.

At that time the subscribers of the Delphos Home Telephone Company, as well as the officers and managers of said defendant company, desired the convenience of long distance telephone communications and desired that said Central Union Company connect its toll lines with their exchanges. Afterwards the plaintiff company in this action was organized for the purpose, among others, of furnishing long distance telephone communications to this defendant company and other independent telephone exchanges in the state of Ohio and elsewhere. It necessitated upon the part of the plaintiff company, in order to furnish the service required by the various independent exchanges such as the defendant, the building of long distance telephone lines connecting the independent exchanges in the state of Ohio. Before investing its money in building these lines the plaintiff acquired from the various independent exchanges in the state of Ohio, contracts, and these contracts, among other provisions, provided that independent exchanges, such as the defendant company in this case, should, in the transmission of all long distance communications going out from the subscribers of the defendant company, use the lines of the plaintiff company for a period of ninety-nine years.

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At some date prior to the filing of this petition the defendant company entered into a contract with the Central Union Company and as a result of said contract the exchange of the defendant company was connected with the long distance system of the Central Union Company so that telephonic messages designed for subscribers of the defendant company coming from points without the village of Delphos, might be transmitted over the long distance lines of the Central Union Company to Delphos and then through the exchange of said defendant company, over the wires of said defendant company to its local patrons and *vice versa* under said arrangement and by reason of said connection, then over the lines of the Central Union Telephone Company instead of using the lines of the plaintiff, the United States Telephone Co.

There is no dispute as to the facts in this case. The only question raised upon the motion to dissolve is whether or not the plaintiff is entitled to the remedy it seeks under its petition.

The defendant admits the execution of the contract set up in plaintiff's petition, but says that that part of the contract which provided that the said contract should remain in force for and during the period of ninety-nine years from the date thereof and thereafter until one year's written notice shall have been given by either party to the other of its intention to terminate the same, is void and contrary to public policy and ought not to be enforced. Defendant contends that said contract is void and contrary to public policy because it tends to create a monopoly and also prohibits the Delphos Company from discharging the obligations which the latter company owes to the public; that said contract of April 1, 1899, is void and contrary to public policy because it tends to stifle competition and promote a monopoly and prohibits the Delphos Company from discharging the duties which it owes to the public; it also contends that said contract cannot be enforced, first, because the contract is lacking in mutuality and because, if enforced, it would involve the continuing supervision by the court of the operation of the telephone exchange and the fixing of the telephone rates for ninety-nine years and because the contract is oppressive, unreasonable and unjust.

The briefs furnished by both plaintiff and defendant cite ample authority. The court has taken the time to read the various citations cited by both plaintiff and defendant, but did not take the time, in preparing his opinion, to comment upon the various cases cited, which counsel for both plaintiff and defendant, in citing the same, contend went to support their position in the case. The court will content himself by saying that in the opinion of the court a large percentage of the cases cited are not applicable to the case at issue.

It appears to this court that when the court comes to consider the

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contract in question, which is the basis of the action between the plaintiff and defendant in this cause, that the court should consider the conditions first that existed at the time that the contract was made and entered into.

The contention that this contract prohibits the Delphos Home Telephone Company from discharging the obligations which the said company owes to the public, the court does not believe is well taken. The objects and purposes of said defendant company, under its charter, were fulfilled when said exchange was installed and various subscribers connected. It was not organized for the purpose of furnishing to its subscribers long distance service, but was organized for the purpose of transmitting local messages between the various subscribers to its exchange. 'Tis true the additional service acquired by reason of the connection with the plaintiff company and with the Central Union Company would probably tend to increase the number of subscribers to the local exchange, but would not necessarily be a function of the company which it was in duty bound to furnish to its subscribers, but admitting that it did owe the duty of furnishing its subscribers with long distance communication and that that obligation was an obligation that the said defendant company owes the public, then was the contract in question such as the law would justify and uphold? The management of said company having made the effort to secure this toll service and to discharge the obligation that the said defendant company owed the public, by furnishing its subscribers with the means of long distance service, and the said Central Union Company being the only long distance company available, the defendant company, upon the refusal of the Central Union Company to make said connection with its exchange, was unable to furnish long distance service to its subscribers unless a competing company should build its long distance lines into the village of Delphos and make said connections and afford said service. The court would refer to the situation that existed in the village of Delphos so far as it applied to the defendant company, prior to the execution of the contract in question. Upon that date the defendant company desired long distance communication, the only company equipped or available at that time being the company who had connection with the Delphos exchange since that time. The plaintiff now complains that at that time the Central Union Company was not willing, although able, to furnish the long distance service that the Delphos company desired. In the opinion of the court there would be no way in which at that time the defendant company could have compelled the Central Union Company to have furnished the long distance communication that it desired. On the other hand, had at that time the Central Union been willing, able and anxious to connect its long distance lines with the telephone exchange and the defendant's

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officers and managers saw fit not to accept any proposition that the long distance company saw fit to submit to them, the court knows of no rule of law that would have compelled the defendant company to have connected with the Central Union Company, and that very principle, as the court sees it, establishes to the satisfaction of this court that it was not a public duty which the defendant company owed to its subscribers to furnish them long distance telephone communication as contended by the defendants in this cause.

It appears to the court that under all the circumstances and conditions, though admitting that that contention would be true, that existed and surrounded the defendant company at the time that the contract in question was made and entered into between this plaintiff and defendant, that the officers of said company were justified in making the contract in question in order that they might secure any long distance service whatever. The terms of said contract are not now seriously complained of by the defendant company, except that part of said contract which stipulates the length of time said agreement is to be in force between the plaintiff and the defendant. It does not appear from the evidence adduced in this case that there is any just cause of complaint on the part of the defendant company as against the plaintiff for failure to carry out the terms and provisions of said contract, nor does there appear to be any just cause of complaint that said contract is not fair and reasonable and just in every particular, unless it be upon the one ground of the duration and length of said agreement. In that connection it might be well for the court to say that there was some evidence that tended to show that the rate charged for the transmission of long distance communications from points outside of the village of Delphos to the subscribers of the defendant company, and also *vice versa* when the subscribers of the Delphos Company desired to send long distance messages to points without the village of Delphos, notably in the case of the service charged to Cleveland, a variation which shows that the Central Union Company charges a less rate than the rate charged by the plaintiff company in this case, and that might give rise to the thought that the Delphos Company if this connection is permitted in this case, if this contract was held void, became, as it were, the agent of the two competing lines, both furnishing the same service. It would be very easy and it is a known principle of law that no individual can act as the agent for two parties, and it would be very easy for the agent to discriminate for or against either the plaintiff or the Central Union Company and it shows the wedge which might destroy and render valueless to a large extent the property rights of the plaintiff company which is built up and based upon contracts similar to the one set forth as the basis of the action in the plaintiff's petition.

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'Tis true that the Central Union Company is able and willing to furnish to the defendant company long distance telephone service. It is also true, in fact the court thinks it is established beyond a doubt, that the subscribers to the defendant company living in Delphos desire this service which the Central Union Company is ready and willing and able to furnish. Why would not the subscribers desire all they could get. Why would not they desire to use all of the long distance lines so long as it did not cost them anything. Any individual would be expected to desire any convenience he could get without cost. It would not cost him anything. The only question is, whether or not the Delphos Company can be enjoined by virtue of the provisions of its contract with the plaintiff from furnishing service which the Central Union Company is ready and willing to give and which the subscribers of the defendant company would like to enjoy; that it could do, were it not precluded by this contract.

As to those places and points reached by the Central Union Company and not reached by the plaintiff, the United States Telephone Company, there is no question in the mind of the court but what the Delphos Company would be permitted to make such arrangements as they saw fit in regard to the reception and transmission of long distance messages, but unless the clause of the contract relative to the term of years that the same shall be in force between the plaintiff and defendant is declared void and contrary to public policy, the defendant company is bound by said contract to send and receive such business from and to points without the village of Delphos over the lines of the plaintiff company by virtue of its contract. This clause in said contract was the basis and security of the plaintiff company for the investment of large sums of money in erecting buildings and purchasing and acquiring long distance toll lines. The service of the said plaintiff company to the defendant company under this contract has been satisfactory to a reasonable degree, in fact to such a degree as could be expected in that line and class of business. The rates are reasonable and, in the opinion of this court, said contract is good, does not lack the element of mutuality and said clause should not be abrogated at this day, after the plaintiff, relying upon said clause, had complied with the contract and expended large amounts of money in carrying out the provisions of said contract.

As to the contention of the defendant company that it tends to create a monopoly, the court does not see it in that light, and even prior to this contract in question and ever since the existence of said contract, the people of Delphos have had the opportunity to use the long distance telephone lines of the Central Union Company; they had their booths there; it simply adds to the convenience of the subscribers and does not create a monopoly.

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Defendant also contends that this action is an action for a specific performance of said contract. Upon that proposition the court is of the opinion that it is not an action for a specific performance of the contract and that the plaintiff is entitled to the remedy it seeks in this court, by reason of the fact that a violation of the contract made and entered into between the plaintiff, which violation is made up of another contract between the defendant and a third party, which violates the terms of its contract with this plaintiff, is sufficient to entitle the plaintiff to enjoin this continuous trespass upon its contractual rights.

That being the conclusion of the court under the evidence adduced, the court will overrule the motion to dissolve the temporary restraining order in this case and exceptions are allowed to the defendant.

INJUNCTIONS—MONOPOLIES—TELEGRAPHS AND TELEPHONES.

[Van Wert Common Pleas, October, 1908.]

UNITED STATES TEL. CO. v. MIDDLEPOINT HOME TEL. CO.

1. EVIDENCE AS TO CIRCUMSTANCES SURROUNDING MAKING OF CONTRACT ADMISSIBLE.

In an action to determine the validity of a contract between two telephone companies, evidence of the condition of the telephone business within the field in which the companies were operating is admissible for the purpose of showing the tendency and effect of the agreement which was made.

2. INJUNCTION LIES TO DETERMINE VALIDITY OF CONTRACTS FOR EXCLUSIVE EXCHANGE OF TELEPHONE TOLLS.

Where the prayer of the petition in such a case is for an injunction restraining the defendant from violating the contract by routing its business over lines belonging to a third company, instead of sending it over the lines of the plaintiff, the action is not open to the objection that it is an attempt to enforce a contract by mandatory injunction and will lie.

3. COMBINATIONS OF TELEPHONE DISTINGUISHED FROM MERGERS OF GAS AND STREET RAILWAY COMPANIES.

Inasmuch as combinations of telephone exchanges and telephone lines are necessary in order to afford proper facilities for the public, and the legislature (Secs. 3455, 3470, 3471 Rev. Stat.) has recognized this necessity by provision for mergers and combinations of such companies, a contract between two telephone companies which provides for an exclusive interchange of business must be distinguished from contracts effecting mergers of gas or street railway companies, and is not void because of a tendency to create a monopoly or subversive of the public interest and benefit; and where a system of lines has been built up on the faith of such an interchange of business, the claim on the part of the defendant company that the contract is in restraint of trade and should be abrogated is not well founded.

[Syllabus approved by the court.]

G. M. Saltzgaber and Cable & Parmenter, for plaintiff.

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J. F. Lindeman, Dailey & Allen, W. B. Mann and D. K. Tone,
for defendant.

MATTHIAS, J.

The questions presented in this case upon a motion to dissolve the injunction heretofore granted, upon the application of the plaintiff, are almost entirely questions of law. Although more than two days were consumed in taking evidence there are but few questions of fact to be considered.

The plaintiff seeks to have the defendant enjoined from a continued and continual violation of the terms of its contract with the defendant, by reason of which violation, toll business which, under the terms of said contract should be transmitted over the lines of the plaintiff, has been diverted and will continue to be diverted, by the defendant, to the lines of the Bell system, so-called. The defendant contends that the plaintiff is not entitled to the remedy it seeks because the contract upon which it relies is contrary to public policy and void for the reason that it tends to create a monopoly and also prohibits the defendant company from discharging the obligation which it owes to the public and for the further reason that said contract lacks mutuality and is oppressive and unjust.

A preliminary question arose during the hearing of the case and presents itself at this time; whether evidence of the conditions relative to the telephone business in Middlepoint and vicinity about and before the time said contract was made could be received and considered by the court in determining the validity of the contract on the theory that it shows the real tendency and effect thereof. The court permitted such evidence to be introduced and we are still of the opinion that it should be considered for the purpose stated.

The United States Telephone Company was organized in 1898, and incorporated under the laws of this state, the powers thereby granted being those of "constructing, purchasing, acquiring, owning and operating toll lines, for the transmission of telephonic communications from and to various cities, towns, villages and points within and beyond the state of Ohio, and to connect said toll lines with telephone exchanges and telephone devices in said several places."

At that time and for some time thereafter numerous telephone exchanges, being so-called Independent exchanges, were in operation throughout Ohio, and, as the evidence shows, especially in north-western Ohio, said exchanges then and for some time thereafter were isolated, there being no connection between them by means of toll or long distance lines or otherwise. Long distance lines were then and long theretofore had been in operation by the Central Union Telephone Com-

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pany, and other companies allied therewith, together known as the Bell system. It was impossible, however, for such Independent exchanges to procure service over said Bell lines, and it was to meet such emergency and to supply the demand arising from such conditions that the United States Company was organized. Said United States Company thereupon entered into contract with said Independent exchanges and undertook to construct toll lines connecting such exchanges and affording their subscribers long distance service which theretofore had been denied them. Such lines, together with the exchanges connected thereby, became known as the Independent system and it appears that, until the happening of the things herein complained of by the plaintiff, said system,—Bell and Independent,—had been maintained separate and distinct from each other and they have been and are competitors for long distance business.

Since its organization the plaintiff has entered into contract, similar to that in question, with nearly three hundred Independent companies operating exchanges, and claims that its investment of large sums of money in constructing, extending and maintaining its lines to meet the demands of the public has been made because of, and upon the faith of said contracts including the one in question here.

The defendant is the successor of the Middlepoint Southern Telephone Company, with which in 1902, the plaintiff entered into a contract similar in its terms to that involved herein and two years later when said Middlepoint exchange was taken over by the defendant, a new contract was made. Copies of said contracts are attached to the petition.

The terms of said contract are such that the parties thereto agreed upon a complete interchange of business between them, upon the basis of compensation therein stated, and the defendant thereby became a part of the system comprised of the Independent exchanges of Ohio and adjoining states, linked together by the toll lines of the plaintiff.

The value of such agreement to the parties as well as all exchanges connected with said system and hence to the subscribers (which the evidence shows constituted a great portion of the public), depended upon the permanency of the plan of operation and that was attempted to be secured by one of the provisions of the contract. It was agreed that neither party should enter into any contract with any other person, firm or corporation "whereby the rights, privileges or advantages herein acquired by either party may be impaired," and it was further agreed that such contract should remain in force for and during the period of ninety-nine years. The contract of 1902 contained a further provision which was not incorporated in the later contract whereby the Middlepoint Company agreed to withdraw its lines from the village of Wetsel and also Delphos, and further agreed not to establish any toll station

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or stations where the plaintiff then had or should thereafter establish a toll station, or to build to or connect with any other telephone company for the exchange of toll business.

Defendant now complains of the exclusive provision of said contract and of the period of its duration, and insists that it cannot be enforced by mandatory injunction. We do not agree with the view taken by counsel for the defendant that the action brought by the plaintiff is one for the specific enforcement of a contract. Plaintiff does not ask or seek a mandatory injunction. It only prays that the defendant be restrained from committing the breach specified, the particular violation which consists in carrying out a contract with the Central Union Company to transmit messages over its lines which it has agreed to send over the lines of the plaintiff. On the other hand the defendant is not here seeking a rescission of its contract with the plaintiff but on the contrary it quite apparently desires to retain all the benefits, privileges and advantages secured to it by that contract.

Plaintiff and defendant have co-operated harmoniously in pursuance of and in compliance with the terms of the said contract until December 23, 1907, when the defendant agreeably to the provisions of a contract theretofore made with the Central Union Telephone Company connected the lines of the latter company with its switchboard and undertook to act as toll agent for the said Central Union Company transmitting messages over the lines of said company and receiving all messages from the lines thereof which were destined to Middlepoint. On February 22, 1908, the temporary injunction now sought to be dissolved was granted, restraining the defendant from maintaining such connection with the Central Union lines.

Is the contract between the plaintiff and defendant void because it is contrary to public policy and prejudicial to the public welfare? Whether the contract is one which tends to create a monopoly and for such reason is void, we find depends much upon the facts. An agreement may be void because of its tendency to create a monopoly when applied to certain classes of business and be quite the contrary when applied to the telephone enterprise. Some combination of telephone exchanges and of telephone lines is absolutely necessary to a proper enjoyment thereof by the public. The development of the Independent system which we have heretofore noticed is an illustration of that fact. The legislature of Ohio recognized the necessity for such a merger and combinations when it enacted Secs. 3455, 3470 and 3471 Rev. Stat., and the sort of merger effected by the contract in question, seems to have been contemplated by the lawmaking power of this state.

The Middlepoint Company was organized for a purpose quite different from that of the plaintiff. The defendant was organized for the

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purpose of acquiring, constructing, owning and operating a telephone exchange in the village of Middlepoint, Ohio, and to supply telephone service to the people of Middlepoint and vicinity. The plaintiff and defendant were not competitors; the nature of their business made them natural and necessary co-operators; the one providing local service to its subscribers, while the other provided toll and long distance service for said exchange which otherwise would have been isolated and thus brought all the subscribers into communication with the subscribers of all other independent exchanges. The merger or combination if such it may be termed, was natural, for it was a matter of necessity to both companies, and of unquestioned benefit to the public. When the defendant by said contract procured the benefits and advantages of toll service for its subscribers, it went further than it was required to go to discharge its full duty under the terms of its charter. There was no legal obligation resting upon the defendants to do more than conduct a local exchange. It is also clear that the defendant could not be compelled to make such connection with the plaintiff or with any other company nor could the defendant require any toll company to connect with its switch board and furnish its subscribers long distance service. The defendant was not required to transmit messages beyond its own lines, but it may do so, and by such lines as it chooses, and when an exclusive contract is made with such a company, it cannot be correctly stated that such contract is in restraint of trade. The evidence is convincing that such contracts have not stifled competition nor is that their tendency. On the contrary they have created competition as is shown by the mere presence of this case in court.

The parallel which is attempted to be drawn with the line of cases dealing with the combination of gas and street railway companies, is not justified, and the rule governing such contracts we regard as inapplicable. A large number of such cases have been cited. We shall not take time to discuss them severally and point out the distinction in each. It is sufficient to say that in such cases it clearly appears that the contracts involved were contrary to public policy because of the restraint in trade; while in the case at bar the benefit of such agreement to the public is apparent. The objection to the contract in question most insistently urged by counsel for the defense is that the toll connection with the Bell system which the plaintiff seeks to enjoin, is a service "which the public demands within the county of Van Wert required." This is not shown by the evidence. The best evidence upon this point is the business done with the Bell Company during the two months such connection was maintained. It appears that during such period practically all the business routed over the Bell line was to and from points reached by plaintiff's lines, the service over which had been

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reasonably satisfactory. Such service was therefore not required to meet the demands of the public for the public unquestionably theretofore had the benefit of the same service and the additional benefits conferred by the dual connection were chiefly upon the Central Union Company.

A line of cases have been cited and quotations freely made therefrom by counsel which hold that a contract for the exclusive right of way over land cannot be enforced. Such is the unquestioned rule, but it is not applicable to the issues presented in this case. No man can by contract or otherwise free his land from the liability of eminent domain, but that does not argue that a telephone company cannot refuse to enter into a contract with another company to solicit and transmit over its line long distance messages, nor does it argue that it cannot enter into a binding contract to send all messages from its exchange to points beyond its own line over the line of another company.

But it is argued that the defendant should be permitted to furnish service for its patrons to points not now reached by the lines of the plaintiff. We think it should be made possible so to do. But it has been shown by the evidence and demonstrated by counsel for the defendants in argument, that such limited operation is impossible. Counsel have skillfully argued that the defendant under the terms of said contract is not forbidden to arrange with the Central Union Company for the transmission of messages to and from points not reached by the United States system; that such messages cannot be transmitted without connecting a line of the Bell system with the defendant's switchboard; that when such connection is thus made with the switchboard of the defendant, any restriction or limitation as to business to be done with the Bell system would require the constant control and supervision of the court. Conclusion: Therefore there can be no limitation or restriction whatever, and the injunction must be dissolved.

The evidence shows a comparatively small demand by the patrons of the Middlepoint Company for service other than that furnished by the Independent system; that the Central Union Company is able to and has heretofore provided service for those demanding it, and that it now maintains a toll booth in Middlepoint. In order that the limited demand for such service may be met more conveniently by plaintiff's competitor, should the contract between the plaintiff and the defendant be avoided and the entire system known as the independent system be thrown open to its competitor? This is what we are called upon to determine, for if such connection can be made and maintained with the Middlepoint Exchange it can be done throughout the field occupied by the Independent system. Should this be done in view of the fact presented?

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The defendant as we have seen does not seek to avoid the contract in question but apparently desires to retain all the benefits and advantages secured to it thereby. With the dual connection we have seen that but two or three of the points from or to which messages were transmitted over the Bell lines were not reached by the United States Company with reasonably satisfactory service. Then the defendant company if such dual connection be maintained regardless of the contract with the plaintiff, is placed in the position of an agent serving two masters, whose interests are necessarily antagonistic. It is as true today as when first spoken in the parable, and has become a fundamental rule that "No servant can serve two masters; for either he will hate the one and love the other; or else he will hold to the one and despise the other." Corporations are controlled and managed by men and what is true of individuals is true of corporations. There can be no question upon a consideration of the evidence before us but that if the contract with the Central Union Company be performed, the end will be accomplished whether or not that be the present purpose and aim of the defendant of diverting from the plaintiff the business to which it is entitled under the terms of its contract, not only business originating at Middlepoint, but business originating at all points, reached by the Bell system, and destined to Middlepoint. Such business may be diverted by the operator without the knowledge of the subscriber or of the company. The conclusion is justified by the evidence before us that the ultimate result would not be beneficial either to the Middlepoint Company or the general public.

The contract in question is not void because of any tendency to create a monopoly. The line of decisions relative to the combination of gas and street car companies as heretofore stated we have found inapplicable to the issues here presented. But few cases have been passed upon by the courts which called for any decision of the rights and liabilities of telephone companies to each other and to the public. The Supreme Court of this state in the case of *State v. Telephone Co.* 36 Ohio St. 296 [38 Am. Rep. 583], goes no further than to hold that a telephone company shall not discriminate in its service against any member of the general public who is willing and ready to comply with the conditions imposed upon all other patrons or customers who are in like circumstances. This decision is not in the least inconsistent with the view that a telephone company in the absence of specific legislation cannot require a competing company to connect its entire system with the switchboard of the other. The import and effect of the decision of Judge Parker, in *People v. Hudson River Tel. Co.* 19 Abb. N. C. (N. Y.) 479, is quite similar to that of our Supreme Court.

A railroad company to secure the necessary investment of capital

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in the discharge of the duty of furnishing sleeping car facilities to the public, may secure to the sleeping car company freedom from competition and the same principle applies to similar exclusive contracts with express companies and stockyard delivery companies. See *United States v. Addyston Pipe & Steel Co.* 85 Fed. Rep. 271 [29 C. C. A. 141], and cases there cited.

The contract in question is not subversive of the public interest and benefit and is not in restraint of trade. The desire of persons to have use of other telephone lines would not justify the abrogation of this contract. When it and other similar contracts were made a toll and long distance system connecting the many independent exchanges of this and adjoining states was formed. Its formation would not have been justified otherwise and it seems far from equitable at this time, when this system has been built up and extended upon the faith of said contracts and in reliance thereon, and such investments have materially increased the value of the local exchanges, and so widely benefited the public, bringing this modern convenience to almost every household, to absolutely disregard the obligations of said contracts and brush them aside upon the theory that they are in restraint of trade because it now seems possible to secure access to the lines of a competing company which was denied until within the last two years.

Defendant has not only urged that such contract is against public policy and in restraint of trade, but contends also that it lacks mutuality and is oppressive and unjust. In support of the claim of want of mutuality, counsel seem to rely chiefly upon the clause of said contract which permits the plaintiff to fix the rates of toll service. The plaintiff does not determine the proportion of such rate which the defendant is to receive; that is fixed by the contract. We regard the contract as no stronger or weaker because of the clause referred to for the reason that the provision is implied that the rates must at all times be reasonable, and "the business is of such a public character that it is entirely subject to legislative regulation."

The motion of the defendant to dissolve the temporary injunction heretofore granted herein, is overruled.

Superior Court of Cincinnati.

LIMITATION OF ACTION—PARTITION.

[Superior Court of Cincinnati, February, 1906.]

***MCNEELY V. CINCINNATI ET AL.**

GRAY V. MCNEELY.

1. DISPUTE AS TO TITLE OF PROPERTY DETERMINABLE IN PARTITION PROCEEDING.

A court, under the law of Ohio, is not ousted from jurisdiction in partition by filing a petition denying title and setting up the statute of limitations, nor is it necessary that the case be held pending a determination of the questions of title in a court at law, but the court has full authority under its equity powers to itself determine the disputed questions of title.

2. STATUTE OF LIMITATIONS DOES NOT DEPRIVE SUBSEQUENT LIFE TENANTS OF ENTAILED PROPERTY UNTIL RIGHT OF ENTRY ACCRUES.

Where the life tenants of an estate tail under a will which provided that the remainder should go to his or her issue for life, with the next remainder in tail to unborn issue, were not made parties to an action for the appropriation of land for street purposes, the adverse possession of the municipality for more than twenty-one years does not deprive such subsequent life tenants of title until the requisite period after their right of entry accrued.

[Syllabus approved by the court.]

Edwards Ritchie and Saul Zielonka, for plaintiff:

C. J. Hunt, A. H. Morrill, I. L. Huddle, Charles Broadwell, C. H. Urban, T. J. Brock, B. B. Dale, J. D. Creed, and Turnipseed & Morgan, for defendants:

HOFFHEIMER, J.

This was a civil action under the code, for equitable partition. Plaintiff claims he has the legal right to the possession of and is the owner in fee simple of a certain undivided part of the real estate set out in the petition. The interest in such lands thus set out, as claimed by the defendants, also appears from the pleadings. It is claimed that the real estate in question cannot be divided in partition by metes and bounds without manifest injury to the same, and that it will have to be sold in order that the parties may realize the fair value thereof. Plaintiff prays that a trustee be appointed to represent the interests of parties who cannot now be determined, and who, upon the decease of certain parties hereafter to be mentioned, will be entitled to a certain interest in a fee simple part of the four and twenty-one hundredths part of the real estate in question. It is urged that a trustee will be necessary to protect said interests, and to make title to the premises

*Since above case was decided the Supreme Court, in *Webster v. Railway*, 78 Ohio St. 87, has held: "No possession can be deemed adverse to a party who has not at the time the right of entry and possessor."

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herein. All the defendants, except the city of Cincinnati, admit the plaintiff's title and join in the prayer for partition.

The original answer of the city of Cincinnati, was practically a general denial. The case was submitted to the court on an agreed statement of facts, and on the evidence adduced by the plaintiff. The defendant, the city of Cincinnati, offered no evidence. Before the case was finally submitted, however, the city filed an amended answer, denying title, and set up the plea of the statute of limitations, the purpose of which was to oust this court of jurisdiction and remit the parties to an action at law and a trial of the issues herein raised by a jury.

At the threshold of the case, therefore, we are met by the question as to whether this court has power to further proceed in the matter to determine disputed questions of title, and then decree partition. The claim of the city practically amounts to this: That under the allegations of the amended answer, disputed questions of title cannot be determined in this proceeding, and the court must either send these issues to a court of law to be tried by a jury, or hold this action, pending such decision. The city relies principally upon *Delaney v. McFadden*, 8 Dec. Re. 381 (7 Bull. 267); *McBain v. McBain*, 15 Ohio St. 337, 350 [86 Am. Dec. 478], and likewise a number of authorities of other jurisdictions. The case having been submitted on an agreed statement of fact, without any express stipulation reserving the questions raised after the submission of such agreed statement of fact, it is a question whether or not the city has not waived the objection now made by it. See *Culver v. Rodgers*, 33 Ohio St. 537, 541, 543, 544; *Byers v. Wackman*, 16 Ohio St. 441, 443; *Bonewitz v. Bonewitz*, 50 Ohio St. 373. 377 [34 N. E. Rep. 332: 40 Am. St. Rep. 671]; *Russell v. Loring*, 85 Mass. (3 Allen) 121.

I am of opinion that the cases relied on by defendant, the city of Cincinnati, do not support the contention of the city. In *Delaney v. McFadden*, *supra*, it will be found that the exact question presented here was not before the court in that case, and although the court did not decide that title could be determined, yet by fair implication, it seems that the court may do so. At page 383 of that decision, the court says:

"While in an ordinary action under the code, for partition, it would, and in the proceeding under the statute it might, be error in the court to refuse to receive proof, because of a mere denial that plaintiff was seized."

And in *McBain v. McBain*, *supra*, it is not decided that title to property in controversy cannot be determined by the court.

Authorities of other states to which I am cited, are of little avail, for although the doctrine contended for by the defendant, the city of

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Cincinnati, appears to obtain in many states, and indeed, seems to be sustained by the weight of authority, it is, nevertheless, not the law of this state. Our courts, it seems, are vested with more ample powers under the circumstances than the courts of other states, notably those to which I am cited. Freeman, Cotenancy and Partition, calls attention to this very condition, and says:

"In several of the states, the courts having jurisdiction over partition are entrusted with more ample powers than those elsewhere exercised by courts proceeding in conformity with the common and statute law of England. This is particularly so in disputes concerning title. Such disputes may in the states referred to, be tried and conclusively determined, and no necessity exists for referring any of the issues to some other tribunal for trial." See Freeman, Cotenancy and Partition Sec. 503, and cases cited, including *Perry v. Richardson*, 27 Ohio St. 110. See also, 6 Pomeroy, Eq. Jurisp. Sec. 712 (1906), and cases cited.

That the answer denying title, and setting up the plea of statute of limitations, does not oust the court of jurisdiction, necessitating a trial of the issue by jury, seems not only established in *Perry v. Richardson*, *supra*, but also by the later case of *Hogg v. Beerman*, 41 Ohio St. 81 [52 Am. Rep. 71]. In both of these cases, defendants denied the plaintiff's title and set up the statute of limitations. The question of title was decided and partition was accordingly decreed. Prior to the revision of the statutes in 1880, a partition proceeding was a special proceeding, and not a civil action, but now a partition proceeding is no longer a special proceeding but is a part of the code. *Swihart v. Swihart*, 4 Circ. Dec. 624 (7 R. 338, 344). So that the action before me is a civil action, *Klever v. Seawall*, 9 O. F. D. 95 [65 Fed. Rep. 393], for equitable partition. And while, in all probability, all actions for partition are now equitable, as this particular case at bar necessitates special equitable relief, viz., the appointment of a trustee in order to make title and to protect the rights of persons at this time unascertainable, there can scarcely be any doubt as to the jurisdiction of this court.

Having thus concluded that notwithstanding the allegations of the defendant, the city of Cincinnati's amended answer, that this court has full power to determine disputed questions of title, we proceed to that part of the case, and to an investigation of the involved questions of title. I may say that the agreed statement of fact shows that all the parties acquired their property from a common source, viz., one Samuel Stitt, who died in the year 1847, and whose will was subsequently before our Supreme Court for construction. *Gibson v. McNeely*, 11 Ohio St. 131. The plaintiff and the defendants (except the city of Cincinnati) claim title as the devisees of said Samuel Stitt, deceased.

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The city, it seems, acquired what title it has, by conveyances from some of the heirs or devisees of Samuel Stitt, deceased, and condemnation proceedings. The parties now claiming were devisees of said Samuel Stitt, deceased, who were not made parties to any condemnation proceedings, nor to deeds conveying the real estate in question to the city, nor were they in any way represented in said proceedings. As the parties claiming title in this case were complete strangers to said proceedings, their rights, if any they had, were not concluded by said proceedings. See *Young v. Heffner*, 36 Ohio St. 232, 238; *McArthur v. Scott*, 113 U. S. 340 [5 Sup. Ct. Rep. 691; 28 L. Ed. 1015].

From the agreed statement of facts, and from the evidence, I find as follows:

Samuel Stitt died in the year 1847, leaving a will. The sixth clause of said will was as follows:

"In case of the death of one or more of said children, leaving issue of his, her or their bodies, at the time this devise takes effect, it is my wish and I do hereby order and direct that such issue, for and during the terms of their natural lives, shall take under this, my will, precisely in the same manner as the immediate ancestor or ancestors of said issue would have taken had he, she or they been then in being; and at the decease of any of the said devisees who shall have taken at the time aforesaid for the term of his, her or their natural lives, I give and devise the shares so given and taken aforesaid to the issue of such devisees so dying, share and share alike, for their lives respectively; and again, at the death of the issue last aforesaid, or any of them, I further give and devise respectively, the share or estate of the said issue, or any one of them dying, to the issue of said issue or any of them, share and share alike, for the terms of their natural lives; and in this manner, down in entailment as far as may be allowed by the statute in such cases made and provided."

Said will is dated February 26, 1844, and was probated in Hamilton county. probate court October 5, 1847. (Par. 20, agreed statement of facts.)

Nancy Wilson, sister of Samuel Stitt, died leaving three children: Nancy Wilson, Jr., Jane Wilson McNeely and William Wilson.

Nancy Wilson, Jr., died, leaving Mrs. M. A. Gibson, an illegitimate child.

Jane Wilson McNeely died, leaving seven children as follows: 1, James C. McNeely, born 1832, died May 17, 1903; 2, Eliza Jane McNeely, born 1834; 3, Mary Keown, born 1839; 4, William McNeely, born 1842; 5, Agnes McNeely Cluggish, born 1844, died November 8, 1902; 6, Samuel McNeely, born 1846; 7, Hamilton McNeely, born 1849.

William Wilson died in 1850.

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James C. McNeely, son of Jane Wilson McNeely, died May 17, 1903, leaving three children; John W., Anna McNeely Owens and Rachel McNeely Gray.

William McNeely, son of Jane Wilson McNeely, disappeared and has not been heard of by his wife, child or relatives for a period of more than seven years prior to the filing of this action. Plaintiff, Harry McNeely, is the sole child of said William McNeely.

Agnes McNeely Cluggish died November 8, 1902, leaving nine children, as follows: 1, Richard Cluggish; 2, Robert Cluggish; 3, Jennie Cluggish Harrison; 4, William Cluggish; 5, Samuel Cluggish; 6, Hamilton Cluggish; 7, Maud Cluggish Cummings; 8, Walter Cluggish; 9, Clarence Cluggish.

Samuel Stitt died seized of the property described in the petition (see agreed statement of facts, Par. 1), and this property was devised according to the sixth section of the will, as hereinbefore set out.

This will of Samuel Stitt, deceased, has been construed by our Supreme Court in *Gibson v. McNeely, supra*.

According to the construction placed by the Supreme Court upon the sixth clause, of said will, Nancy Wilson, Jr., Jane Wilson McNeely and William Wilson each received a life estate in the undivided third part of the premises devised, remainder for life as tenant in tail of each one's share to his or her issue; remainder in tail to the unborn issue, which gives them the fee.

Mrs. M. A. Gibson therefore, received a life estate in the same property formerly held for life by Nancy Wilson, Jr.; the seven children of Jane McNeely received a life estate in the same property formerly held for life by their mother, and William Wilson's child received a life estate in the same property formerly held by his father, if living.

The children of James C. McNeely, Eliza Jane McNeely, Martha McNeely Keown, William McNeely, Agnes McNeely Cluggish, Samuel McNeely, Hamilton McNeely, following the construction of this will in *Gibson v. McNeely, supra*, are entitled to an undivided third part of the fee simple property described in the petition, after the termination of the life estate. That is to say, that the heirs of each of the children of Jane McNeely, deceased, are entitled to one-seventh (seven children of Jane McNeely) of one-third, equaling one-twenty-first part of the fee simple estate. Harry McNeely, being the sole child of William McNeely, deceased, on proof of his father's death, would be entitled to one-twenty-first part of the fee simple estate.

Jane W. McNely, Anna McNeely Owens and Rachel Gray are each entitled to one-third of one-seventh of one-third, equaling one-sixty-third part of the fee simple estate.

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Cluggish, Samuel Cluggish, Hamilton Cluggish, Maud Cummings, Walter Cluggish and Clarence Cluggish are each entitled to one-ninth of one-seventh of one-third, equaling one one-hundred and eighty-ninth part of the fee simple estate.

The owners of the remaining four-twenty-first part of the fee simple estate, cannot now be determined, as Eliza Jane McNeely, Martha Keown, Samuel McNeely and Hamilton McNeely are alive.

The undivided two-third part of the fee simple property described in the petition, descended to the heirs of Samuel Stitt, deceased, who were: Nancy Wilson, Jr., Jane McNeely and William Wilson, children of Nancy Wilson. *Gibson v. McNeely, supra*.

The city of Cincinnati acquired the undivided two-third part of the fee simple estate by legal proceedings to condemn the property for street purposes, and by various deeds. (See agreed statement of facts, Pars. 6, 3, 4, 5.)

The city of Cincinnati also acquired the life estates of Samuel McNeely, Hamilton McNeely, Agnes Cluggish, Martha Keown, Elizabeth McNeely, James C. McNeely and William McNeely. (See agreed statement of facts, Pars. 7, 9, 10, 11, 12, 13, 14 and 15.)

Neither plaintiff nor the defendants, except the city of Cincinnati, were parties to the legal proceedings; nor were they represented. See *Youngs v. Heffner, supra*; *McArthur v. Scott, supra*.

The city of Cincinnati had been in open, notorious and adverse possession of the property described in the petition for more than twenty-one years prior to the filing of this suit. But this does not affect the rights of these parties, because of the date at which their right of entry accrued, as will be shown. *Carpenter v. Denoon*, 29 Ohio St. 379, 397, 398; *Holt v. Lamb*, 17 Ohio St. 374.

According to the construction of the will Samuel Stitt, deceased, in *Gibson v. McNeely, supra*, the parties to this suit, except the city of Cincinnati, are entitled to certain undivided parts of the fee simple estate, determined on the life estates of their parents.

1. *As to Harry McNeely.* Harry McNeely, as appears from the above findings, was the son of William McNeely. According to proof, his father was absent from home and not heard of for more than seven years prior to the bringing of this suit. A legal presumption of death therefore arose. The *prima facie* evidence of his death was not rebutted by counter-proof. *Youngs v. Heffner, supra*, 233. Harry McNeely is therefore entitled to whatever rights he may have in the property as though his father were proven dead. The life of said William McNeely having determined, I therefore find his son, Harry E. McNeely, to be seized of an absolute estate in fee simple, and entitled to the possession of an undivided one-twenty-first part of the premises. His right of entry

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accrued in 1898 (see record, page 31). See also, *Carpenter v. DeNoon*, *supra*, Syl. 9.

2. *As to the children of Agnes McNeely Cluggish.* Agnes McNeely Cluggish having died November 8, 1902, and her life estate having thus determined, I find her children, Richard, Robert, Jennie Cluggish Harrison, William, Samuel, Hamilton, Maud Cluggish Cummings, Walter and Clarence, each to be seized of an absolute estate in fee simple, and are entitled to the possession of an undivided part respectively, amounting to one one-hundred and eighty-ninth part of the fee simple estate. Their right of entry accrued at the death of their mother, November 8, 1902.

3. *As to the children of James C. McNeely.* James C. McNeely having died May 17, 1903, and his life estate having thus determined, I find his children, Jane W., Ann McNeely Owens and Rachel Gray, are seized of an absolute estate in fee simple and are each entitled to the possession of an undivided one-sixty-third part of the fee simple estate. Their right of entry accrued at the death of their father, May 17, 1903.

4. Eliza Jane McNeely, Martha Keown, Samuel McNeely, Hamilton McNeely, children of Jane McNeely, are as already shown, still alive. Whatever reversionary interests there may be at their deaths, will, under the construction placed upon the will by our Supreme Court (if they die without issue) go to the respective heirs at law of Samuel Stitt, not as devisees, but as heirs, see *Gibson v. McNeely*, *supra*. But if they die leaving issue, such issue will take in accordance with the opinion. It therefore becomes necessary to appoint a trustee to protect the rights of those not yet ascertained, and to satisfy such future interests as there may arise. And the court will appoint such trustee when the decree is drawn. This trustee shall receive and hold the value of an undivided four-twenty-first part of the fee simple estate to which the unascertained and unknown owners, for whose benefit the trustee is to be appointed, will be entitled. At this point, it is well to call attention to the fact that the original petition asks that a trustee be appointed to receive and hold the value of six-twenty-first part of the fee simple estate, and that the supplemental petition asks for the appointment of a trustee to take charge of the value of four-twenty-first part. The difference is caused by the fact that the original petition herein was filed September 27, 1900. Since the filing thereof, James C. McNeely and Agnes McNeely Cluggish have died leaving children.

5. The city of Cincinnati is seized in fee simple and is entitled to the possession of an undivided fourteenth-twenty-first part of the property, and also the life estates of the other parties above set out. As these coparceners are seized of the parts of the fee simple estate

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as above set forth, and are entitled to the possession of the undivided parts thereof, and as the property cannot be divided into metes and bounds without manifest injury to the value of same, the plaintiff is entitled to partition as prayed for, and the decree may be drawn in accordance therewith. If the parties can agree upon the name of the trustee to be appointed, such party will be appointed. Otherwise, the court will appoint a proper and suitable person to serve in the capacity mentioned.

Decree accordingly.

GRAY v. McNEELY.

HOFFHEIMER, J.

The foregoing opinion in *McNeely v. Cincinnati et al.*, was handed down some time since, but by agreement of counsel and the parties, the decree was withheld because in the case of *Rachel Grey v. John M. McNeely et al.*, No. 52246, superior court of Cincinnati, similar questions were involved and counsel asked leave to make other parties in lineal descent parties defendant. Leave having been granted, there was practically a rehearing covering all the questions previously considered and as to the former and the new parties. Able arguments were made on the rehearing, and elaborate briefs were submitted, but it is impossible for this court to reach any other conclusions than those heretofore set out without refusing to follow the decision of *Gibson v. McNeely*, 11 Ohio St. 131, wherein the will involved herein was construed and this the court declines to do. Let a decree therefore be drawn in accordance with the opinion heretofore rendered by this court in *McNeely v. Cincinnati*, No. 50855.

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CORPORATIONS.

[Summit Common Pleas, November 16, 1908.]

AKRON V. EAST OHIO GAS CO.

INJUNCTION LIES TO COMPEL NATURAL GAS COMPANY TO CONTINUE THE EXERCISE OF ITS FRANCHISE.

A company incorporated under the laws of Ohio, for the purpose of producing, acquiring, transporting and supplying natural gas to consumers in certain cities and villages of this state, obtains a franchise for a public service; and, having laid its mains in the streets and public ways pursuant to ordinance of a certain city and supplied its customers with natural gas for a term of years, it cannot, without consent of the state, suddenly or arbitrarily abandon or relinquish its franchise as to such city or refuse to supply its customers therein with gas. Mandatory injunction will, therefore, lie to compel such company to continue to exercise its franchise to furnish natural gas in such city so long as it continues to exercise its franchise as to other places in the state.

[Syllabus approved by the court.]

N. M. Greenberger, city solicitor, Jonathan Taylor, Grant, Sieber & Mather and G. M. Anderson, for plaintiff:

Cited and commented upon the following authorities: *State v. Gas Light & C. Co.* 18 Ohio St. 262; *Dayton v. Railway*, 12 Dec. 258; *Morrow Co. Illum. Co. v. Mt. Gilead*, 10 Dec. 235 (8 N. P. 669); *Cleveland & M. Ry. v. Furnace Co.* 37 Ohio St. 321 [41 Am. Rep. 509]; *Thomas v. Railway*, 101 U. S. 71 [25 L. Ed. 950]; *York & Maryland Line Ry. v. Winans*, 58 U. S. (17 How.) 30 [15 L. Ed. 27]; *Pennsylvania Co. v. Railway*, 118 U. S. 290 [6 Sup. Ct. Rep. 1094; 30 L. Ed. 83]; *State v. Railway*, 19 Wash. 518 [53 Pac. Rep. 719; 41 L. R. A. 515; 67 Am. St. Rep. 739]; *State v. Railway*, 53 Kan. 377 [36 Pac. Rep. 747; 42 Am. St. Rep. 295]; *Chicago Gas Light Co. v. Gas Light Co.* 121 Ill. 530 [13 N. E. Rep. 169; 2 Am. St. Rep. 124]; *New Orleans Gas Light Co. v. Light & Heat Produc. & Mfg. Co.* 115 U. S. 650 [6 Sup. Ct. Rep. 252; 29 L. Ed. 516]; *Louisville Gas Co. v. Gas-Light Co.* 115 U. S. 683 [6 Sup. Ct. Rep. 265; 29 L. Ed. 510]; *Shepard v. Gas Light Co.* 6 Wis. 539 [70 Am. Dec. 479]; *St. Louis v. Gaslight Co.* 70 Mo. 69; 2 Morawetz, Priv. Corp. Sec. 1129; 2 Dillon, Munic. Corp. Sec. 691; *Potwin Place (City) v. Railway*, 51 Kan. 609 [33 Pac. Rep. 309; 37 Am. St. Rep. 312]; *San Antonio St. Ry. v. State*, 90 Tex. 520 [39 S. W. Rep. 926; 59 Am. St. Rep. 834]; *Sharpless v. Philadelphia (Mayor)*, 21 Pa. St. 147 [59 Am. Dec. 759]; *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.* 85 Me. 532 [27 Atl. Rep. 525; 35 Am. St. Rep. 394]; *Levis v. Newton (City)*, 75 Fed. Rep. 884; *Toledo v. Gas Co.* 3 Circ. Dec. 273 (5 R. 561); *Gas-Light Co. v. Zanesville*, 47 Ohio St. 35 [23 N. E. Rep. 60]; *St. Louis & S. F. Ry. v. Gill*, 156 U. S. 649 [15 Sup. Ct. Rep.

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484; 39 L. Ed. 567]; *State v. Traction Co.* 10 Circ. Dec. 212 (18 R. 490); *Scofield v. Railway*, 43 Ohio St. 571, 594 [3 N. E. Rep. 907; 54 Am. Rep. 846]; Freund, Police Power Sec. 395; *Bank of Toledo v. Toledo*, 1 Ohio St. 664; *Munn v. Illinois*, 94 U. S. 113 [24 L. Ed. 77]; *State v. Gas Light & C. Co.* 34 Ohio St. 572 [32 Am. Rep. 390]; *Butchers' Union S. H. Co. v. Live-Stock Land. & S. H. Co.* 111 U. S. 746 [4 Sup. Ct. Rep. 652; 28 L. Ed. 585]; *St. Tammany Water-Works Co. v. Water-Works Co.* 120 U. S. 64 [7 Sup. Ct. Rep. 405; 30 L. Ed. 563]; *Gibbs v. Gas Co.* 130 U. S. 396 [9 Sup. Ct. Rep. 553; 32 L. Ed. 979]; *Visalia Gas & E. L. Co. v. Sims*, 104 Cal. 326 [37 Pac. Rep. 1042; 43 Am. St. Rep. 105]; *Olcott v. Fond Du Lac Co. (Supvrs.)* 83 U. S. (16 Wall.) 678 [21 L. Ed. 382]; Beach, Contracts Sec. 1198; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 538 [41 N. E. Rep. 1033]; *People v. Gas Trust Co.* 130 Ill. 268 [22 N. E. Rep. 798; 8 L. R. A. 497; 17 Am. St. Rep. 319]; *Blair v. Chicago*, 201 U. S. 400 [26 Sup. Ct. Rep. 427; 50 L. Ed. 801]; *Ft. Worth St. Ry. v. Ferguson*, 9 Tex. Civ. App. 610 [29 S. W. Rep. 61]; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438 [56 N. E. Rep. 822; 48 L. R. A. 568; 75 Am. St. Rep. 184]; Elliott, Railroads Sec. 638; *People v. Railway*, 24 N. Y. 261 [82 Am. Dec. 295]; *State v. Railway*, 53 Kan. 329 [36 Pac. Rep. 755; 24 L. R. A. 564]; *Union Pacific Ry. v. Hall*, 91 U. S. (1 Otto) 343 [23 L. Ed. 428]; Beach, Corporations Sec. 781; *Lauman v. Railway*, 30 Pa. St. 42 [72 Am. Dec. 685]; *Central Ry. v. Collins*, 40 Ga. 582; *New York, L. E. & W. Ry. v. Commonwealth*, 153 U. S. 628 [14 Sup. Ct. Rep. 952; 38 L. Ed. 846]; Paige, Contracts Sec. 447; *Fisher v. Railway*, 6 Dec. 67 (3 N. P. 283).

Kline, Tolles & Goff and Tibbals, Frank & Ream, for defendant.

DOYLE, J.

The East Ohio Gas Company was incorporated pursuant to, and by favor of, the provisions of the Statutes of Ohio, on September 8, 1898, for the purpose of producing, purchasing and acquiring natural gas; of piping and transporting natural gas from the place or places where it is produced, purchased or acquired to Saint Clairsville, in Belmont county, Uhrichsville, Dennison, New Philadelphia, Canal Dover, Bolivar, and Zoar, in Tuscarawas county, Navarre, Canton and Massillon, in Stark county, and Akron and Cuyahoga Falls, in Summit county, Ohio, and to other cities, villages and places in the counties aforesaid; of selling and supplying natural gas at said places to consumers, and of laying and maintaining all street mains and pipes necessary for said purpose, with the right to acquire and hold all such lands, leases, right of way and other real and personal property as may be necessary or convenient for the purpose of producing, transporting, selling and supplying natural gas as aforesaid.

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The kind of improvement intended to be constructed as set forth in the articles of incorporation is a line of wrought iron pipe laid under ground from the place where the natural gas is produced, purchased or acquired, to the cities and places aforesaid, to connect with street mains and pipes laid in the streets, lanes, alleys and public grounds of the cities and places aforesaid, for the transportation and supply of natural gas to the said cities and places and their inhabitants, to which shall be connected all such regulators, valves, curb boxes and safety appliances as may be necessary in the conduct of said business.

The said line shall commence at a point on the Ohio river in Belmont county, Ohio, and run from there through Belmont, Harrison, Tuscarawas, Stark and Summit counties, to Cuyahoga Falls in Summit county. The *termini* of said improvement shall be a point on the Ohio river in Belmont county, Ohio, and a point at Cuyahoga Falls in Summit county, Ohio.

In 1902 the company amended its articles of incorporation so as to specifically include Cleveland and Cuyahoga county in its field of operations, but not changing its charter in respect to other places in the counties aforesaid.

The amended charter contains another additional privilege, that of manufacturing gas and transporting and supplying the same in the territory embraced in the franchise, and some other matters incident to the manufacture of gas.

The company on September 26, 1898, by an ordinance of the council of the city of Akron acquired the consent of the municipal authorities of that city to lay its pipes for conducting gas through the city, to supply consumers of gas therein.

The defendant is now actively supplying the cities of Cleveland, Akron, Canton and Massillon and is purposing to furnish Youngstown, Warren, Niles, Ravenna, Kent, Cuyahoga Falls and Alliance with natural gas.

The defendant has lines of mains and supply pipes extending in a southerly direction across the state of Ohio from Cleveland to the state line in the middle of the Ohio river, one of which supplies the cities of Akron and Canton.

The ordinance giving the consent of the municipal authorities of Akron to the East Ohio Gas Company to occupy its streets with gas pipes, fixed the rate to be charged for natural gas furnished to the citizens and public buildings of said city, during the period of ten years next ensuing after its passage as follows: during the first five years at twenty-five cents per thousand cubic feet if paid before the tenth day of the month following the selling and delivery thereof and twenty-seven cents if not paid in that time, and after the expiration of five years from the date of the passage of the ordinance at thirty

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cents and thirty-two cents respectively according to whether paid before the tenth day of the month following the use.

The ordinance also provided for a discount of 10 per cent for gas furnished certain public institutions.

This ordinance was accepted in writing by the defendant.

At the expiration of the ten years period provided for in this ordinance and pursuant to Sec. 2478 (Lan. 3739; B. 1536-567) Rev. Stat. the council on October 7, 1908, passed an ordinance fixing the rates to be charged for natural gas at twenty and twenty-two cents respectively according to whether paid on the tenth of the month following its use, to be operative for the period of ten years following the expiration of the ten-year period provided in the first ordinance.

The defendant notified the plaintiff that it would decline to accept the terms of said ordinance; and that it would cease to furnish the city and its inhabitants with natural gas.

The plaintiff thereupon filed its petition in this court asking that the defendant be enjoined from ceasing to supply natural gas to the public buildings and the inhabitants of said city.

The answer of the defendant does not controvert the allegations of the petition but pleads as follows as a defense:

"Defendant has notified the plaintiff that it would decline to accept the terms of said ordinance; that it would cease to furnish the said city and its inhabitants with natural gas; intending thereby entirely to relinquish and surrender the privileges and franchise granted to it by the ordinance of September 26, 1898, and wholly to retire from said city. This intention defendant now confirms.

"Defendant therefore asks that the temporary injunction heretofore granted herein may be dissolved and that this defendant may be permitted to surrender said privilege and franchise, to remove its mains and pipes from the streets and other public places of said city, restoring the same to their present condition, and to retire from the business of furnishing natural gas to the said city of Akron and its inhabitants."

The issue in this case is narrowed down to the question, whether the defendant can now relinquish and surrender the privileges accorded it under the laws of this state and ordinance of the plaintiff consenting to the laying of defendant's pipes in the city, and wholly retire from the business of furnishing natural gas to the plaintiff and its inhabitants.

Has the plaintiff the right to require the defendant to remain in the city in the exercise of its franchise to furnish natural gas, whether the company is willing so to do or not?

The right of the defendant to exist as a legal entity to prosecute the purposes of its organization was derived from the state pursuant to statutes providing for the incorporation of companies.

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Formerly under the old constitution corporations could be created by special acts of the legislature. These were called charters. Under the present constitution corporations must be formed under the general laws. The legislature has provided in detail what shall be done by an aggregation of individuals who desire to incorporate. Having complied with the provisions of the law the secretary of state issues the articles of incorporation.

Where the legislature acts directly in granting the privileges of being a body corporate the character of the right is more apparent than where the body is created under a general law. The special privilege emanates directly from the government by a special legislative enactment, and has none of the appearance of a right rather than a privilege.

The fact that, now, no action of a public body like a legislature, acting specially, confers a privilege which it may withhold if it chooses, does not make the securing of the right to be a body corporate by conforming to the provisions of a general law, any less a franchise.

In the one case it may be said to have been granted and in the other obtained.

Where such incorporation is for purposes of a public nature; to meet a public necessity; or of such a character that having been once undertaken it cannot be discontinued without prejudice to the public interest, the franchise takes upon itself the character of a contract between the state from whom the franchise issued and the body corporate existing and operating under it.

No case exactly like the one at bar has been found, but the rules established by some of the courts for construing franchises similar to that of defendant may apply.

It is not contested but what the defendant could be compelled to resume furnishing gas to some portion of the city which it might attempt to abandon. Cases like *State v. Railway*, 29 Conn. 538, it is claimed, do not apply. In that case the Hartford & New Haven Railroad Company was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. A steamboat company was afterward chartered which connected with the harbor terminus and was a great convenience to the public. The railroad changed its route and attempted to discontinue running to the harbor. It was compelled by mandamus proceedings to continue. That was an attempt to abandon a part of a railroad.

In this case there is an attempt so claimed by defendant to abandon all its rights in the city of Akron and not a part. Hence, it is claimed that the doctrine of that and similar cases is not applicable.

The leading cases where the character of the business of supplying gas or water to cities and their inhabitants are considered have arisen

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from an attempt of companies operating under franchises to carry on such business, to dispose of and abandon their franchises by contract.

Chicago Gas Light & C. Co. v. Gas Light & C. Co. 121 Ill. 530 [13 N. E. Rep. 169; 2 Am. St. Rep. 124], was a case where one gas company by contract agreed with another not to furnish gas to any persons within a certain part of the territory of the city where it had been authorized to furnish gas.

The same may be said of this case as of the Hartford & New Haven railroad case, that is, that there was a mere attempt to abandon a part of the field of operation and not the entire field. The case is cited for the reason that it defines the character of the business of furnishing gas and also for the reasons given for denying the gas company the right to so abandon a part of the field of its operations.

It was held in that case, that the manufacture and distribution of illuminating gas, under legislative authority, in the streets of a town, or city, is the exercise of a franchise belonging to the state. Such a franchise is conferred for the benefit of the public as well as of the company.

The court said in the *dictum* that the business was of a public nature and held that by such a contract it bound itself to avoid the performance of a public duty, and such contract was against public policy, *ultra vires* and void. This doctrine was reaffirmed in *People v. Trust Co.* 130 Ill. 268 [22 N. E. Rep. 798; 17 Am. St. Rep. 319; 8 L. R. A. 497].

In *Peoria & R. I. Ry. v. Mining Co.* 68 Ill. 489, it was held that the duties which railroad companies owed to the public, and which are the considerations upon which their privileges are conferred, cannot be avoided, by neglect, refusal or agreement with other persons or corporations. Therefore, any contract to prevent the faithful discharge of any such duties will be against public policy and void.

It has also been held in that state that the sale of the powers of one company to another without authority of legislature is against public policy and courts will not assist to promote the transfer. *Hays v. Railway*, 61 Ill. 422.

A case where an attempt was made by a public service corporation to dispose of its entire franchise was *Thomas v. Railway*, 101 U. S. 71 [25 L. Ed. 950], where it was held:

"The franchises and powers granted to such corporations are, in a large measure, designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. Any contract, by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligation without the consent of the state, is a violation of its contract with the state and is forbidden by public policy and is, therefore, void."

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Miller, J., said:

"Where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the state to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state and is void as against public policy."

In *New Orleans Gas Light Co. v. Light & Heat. Prod. & Mfg. Co.* 115 U. S. 650, 669 [6 Sup. Ct. Rep. 252; 29 L. Ed. 516], it was said:

"The manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every-one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever and upon what terms it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety."

In *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674 [6 Sup. Ct. Rep. 273; 29 L. Ed. 525], it was held as follows:

"The charter of the New Orleans Water Works Company, granting to that corporation the exclusive privilege of supplying New Orleans and its inhabitants with pure and wholesome water from the Mississippi river, by means of mains and pipes placed in the streets, public places, and lands of that city—reserving to the city council authority to grant to any person, contiguous to that stream, the privilege of laying pipes to the river, exclusively for his use—constitutes a contract within the meaning of the contract clause of the constitution of the United States."

Harlan, J., page 680 (29 L. Ed. 527), says:

"The New Orleans Water Works Company was in existence before the adoption of the present constitution of Louisiana, one of the articles of which, as we have seen, repeals the monopoly features in the charters of all then existing corporations other than railroad companies. This case is, therefore, controlled by the decision just rendered in *New Orleans Gas Light Co. v. Louisiana Light and Heat Producing and Manufacturing Co.* [*supra*]. The two are not to be distinguished upon principle; for if it was competent for the state, before the adoption of her present constitution, as we have held it was, to provide for supplying the city of New Orleans and its people with

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illuminating gas by means of pipes, mains, and conduits placed, at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city. The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the state, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interest. And as the object to be attained was a public one, for which the state could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property. Such was the nature of the plaintiff's grant, which, not being at the time prohibited by the constitution of the state, was a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law. It is as much a contract, within the meaning of the constitution of the United States, as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below designated point."

An enterprise the purpose of which is to render service to the public, although under private control, is a *quasi*-public business, and not one in which every one may engage as of right, but is a franchise, and when not forbidden by the organic law of the state, may be granted to whomsoever and upon what terms the state pleases. *New Orleans Water Works Co. v. Rivers, supra.*

In *Louisville Gas Co. v. Gas Light Co.* 115 U. S. 683 [6 Sup. Ct. Rep. 265; 29 L. Ed. 510, 513, the court say:

"Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas lights. The former article may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is * * * a matter of which the public may assume control, services rendered in supplying it for public and private use constitute * * * such public services as, under the constitution

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of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question."

To the same effect are *Shepard v. Gas Light Co.* 6 Wis. 539; *St. Louis v. Gaslight Co.* 70 Mo. 69; 2 Dillon, Munic. Corp. (3 ed.) Sec. 691; 2 Morawetz, Priv. Corp. Sec. 1129.

A later case, *Gibbs v. Gas Co.* 130 U. S. 396 [9 Sup. Ct. Rep. 553; 32 L. Ed. 979], holds:

"The supplying of illuminating gas is a business of a public nature, to meet a public necessity; and where such business cannot be restrained without prejudice to the public interest, contracts imposing such restraints, however partial, will not be enforced or sustained, because in contravention of public policy. •

"A corporation cannot disable itself by contract from performing the public duties which it has undertaken, nor, by agreement, compel itself to make public accommodation subservient to its private interests."

Chief Justice Fuller, page 411 (32 L. Ed. 985), says:

"These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated. At common law corporations formed merely for the pecuniary benefit of the shareholders could, by a vote of the majority thereof, part with their property and wind up their business; but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule.

The Supreme Court of this state has said that the supplying of natural gas to municipal corporations and their inhabitants is a public use or service. *State v. Toledo*, 48 Ohio St. 112-136-142 [26 N. E. Rep. 1061; 11 L. R. A. 729].

That was a case involving the right of the city to supply itself and its inhabitants. Held, that it could. That fixes the character of such uses in Ohio, and the state giving the same privilege to a corporation will surely not change the nature of that use.

If a contract made by a gas company, by which it divests itself of the privilege of furnishing gas to a community is against public policy, is *ultra vires* and void, the logical deduction is that any other effort to accomplish the same object would be likewise void unless on account of the unprofitableness of the enterprise or for other cause it has been a failure.

The statutory law of this state provides for the incorporation of companies of this character and delegates to the municipal corporations and quasi-municipal authorities the power to make the terms upon

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which such corporations shall occupy and use the highways and public grounds, and pass through the lands of their respective jurisdictions, for the purpose of exploiting the public enterprises which they have undertaken. After the corporation, in furtherance of the purposes of its franchise has begun the supplying of a public need whether necessary or created by the suggestion and inducement of the company so proposing to minister to the public requirements in that behalf, can it from caprice or for business reasons abandon the enterprise?

The question has not been squarely before the court but it has been suggested that the only reason for which such an enterprise could be abandoned was because it was unremunerative and unprofitable.

In *Chicago Gas Light & C. Co. v. Gas Light & C. Co.*, *supra*, it was said, (2 Am. St. Rep. 131):

"There may be cases where a corporation may abandon a public work for reasonable cause, but this is a very different thing from disabling itself, by contract, from the performance of a duty to the public."

In *Gibbs v. Gas Co.* *supra*, the court said:

"But we are not concerned here with the question where, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of the manufacture of gas was largely below the price to be charged named in the stipulation between the parties."

The interest of the public in the business of supplying gas to it is such that it would be against public policy to allow a corporation organized for the purpose of so supplying gas to discontinue except for good cause. A showing that the business is unprofitable or for other good and sufficient reasons the objects of the corporation have failed might excuse a fulfillment of its obligations under its franchise and allow it to dissolve and surrender its franchise, but even in such an event the public interest may be such that the business should be kept in operation until its wants are supplied by other means.

If the defendant in this case were organized for the sole purpose of supplying the city of Akron with gas and were attempting to abandon the enterprise and withdraw, under the above holdings of the court, the court would be constrained to hold that it could not. But this is not a case of an entire abandonment of its business. The East Ohio Gas Company only seeks to abandon a part of its field of operation. It was organized to supply gas to the villages and cities and inhabitants in five counties of the state, which were chosen originally as the field of operations and one other county has been added by amendment of its charter. It is now actively supplying gas in four

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of the cities in the district composed of these counties, and is now preparing to supply the other places mentioned, which it has prepared to do by laying of gas mains through the district.

Both parties have referred to the ordinance giving defendant leave to use the streets of the city for laying its pipes as the source of the rights and obligations of both parties. This may be correct in part, that is, as to all the matters and things stipulated in that ordinance. So far as it goes it is a contract between the plaintiff and defendant, but neither the state nor the inhabitants of the city are precluded of their rights by the ordinance contract.

There is a prior and controlling contract to be considered and that is the franchise granted by the state to the defendant.

When a company avails itself of the privileges of the incorporation laws of the state and takes advantage of statutory privileges, such as provided in Sec. 3550 Rev. Stat. whereby it is privileged to supply gas to a city and for that purpose to lay conductors or pipes therefor in the streets, it has acquired a valuable privilege and, it being of a public character, has assumed an obligation that requires it where the project has once been entered upon, to continue it until relieved by the power which granted the privilege.

The legislature could by general laws grant a gas company the right to use the streets without municipal control and provide its own regulations governing the supplying of gas. The streets and other public grounds of a municipality belong to the public and are, by the state, put into the care, custody and control of the municipal authorities for care and preservation for the uses of their dedication. Without legislative authority the municipality cannot grant rights in public property of that kind to interfere with public uses.

It was therefore logical that the state having placed the care and control of the streets in the municipality should also constitute it an agency of the state to prescribe the manner in which these corporations for public service could occupy the streets for prosecuting their business.

By Sec. 3550 and like statutes, the state grants the right to occupy the public grounds but qualifies the grant by a provision that it shall be with the consent of the municipal authorities and under such reasonable regulations as they may prescribe.

Before a public service company like a gas or water company can begin the supplying of the inhabitants of a city it has virtually made two contracts under which it has assumed divers and sundry obligations, one with the state by which it assumes the duties devolving upon it to render the public service which the purposes of its organization have defined, and the other with the municipality by which it has assumed to carry out the things on its part agreed to be done as set

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forth in the ordinance by which consent of the municipal authorities was obtained.

The East Ohio Gas Company when it secured its charter proposed to supply the cities of a certain territory or district of the state with natural gas. The state, by the provisions of the statutes passed for the benefit of such companies, gave it the right to occupy the streets of these cities, provided it secured the consent therefor from the municipal authorities. It secured such consent from the municipal authorities of Akron and began supplying the inhabitants of Akron with gas. The grant of the state was then complete and the contract fully entered into.

It cannot without the consent of the state refuse to supply the inhabitants of that city without violating the contract. The contract with the state is entire; it is not composed of separate grants, but there has been one grant to this company giving it rights in all the public grounds of all the cities of the entire district or territory selected by it for the prosecution of its business.

It may secure consents in one or more cities, as its officials desire, but having once secured such consent in any of these, and entered into the business of furnishing gas, it cannot cease from furnishing gas in such cities to the extent therein it has begun furnishing the inhabitants, thereof, without the consent of the state.

It might as well claim the right to cease furnishing gas on a particular street, which it has occupied and on which it has begun supplying the inhabitants in a city, as to cease supplying any of the cities in the district when it has once begun supplying them.

Taking the strict construction of defendant's counsel put on the holding of the Supreme Court in the first syllabus of *Gas Light Co. v. Zanesville*, 47 Ohio St. 35, as correct, the defendant can be compelled by a mandatory injunction to furnish gas so long as it continues to exercise and enjoy its franchises as a gas company.

In that instance the franchise covered only the territory embraced within the limits of that city and the decree of the district court which was affirmed, was framed to cover the boundaries of its franchise, to wit, "within the city of Zanesville."

Applied to the case at bar the Zanesville case would require the defendant to continue to supply natural gas to the plaintiff and its inhabitants so long as "it continues to exercise its franchises within the" territory or district chosen by it in its articles of incorporation within which to carry on its purposes of supplying consumers with natural gas.

Following that case literally this court would be compelled to hold that the defendant must continue to supply the plaintiff and its in-

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habitants with natural gas so long as it continues to exercise its franchise.

The regulation of the price which defendant may charge for natural gas in the city of Akron as established by the ordinance of October 7, 1908, was made pursuant to Sec. 2478 (Lan. 3739; B. 1536-567) Rev. Stat.

In *State v. Gas Light & C. Co.* 18 Ohio St. 262, it was held:

“The intention of the legislature in empowering city councils to regulate the price of gas, was to limit incorporated gas companies to fair and reasonable prices for the gas which they might furnish for public or private use. This discretionary power of regulation might have been vested elsewhere; but wherever vested it must be exercised in good faith, for the purpose for which it was given.”

Bad faith of a council in passing an ordinance fixing the price, inadequacy of price and arbitrary and unreasonable regulations are a proper subject of inquiry when put in issue. *State v. Gas Light & C. Co. supra*; *State v. Gas Co.* 37 Ohio St. 45.

Not being in issue in this case, the decree must be for the plaintiff upon the facts and pursuant to the law of the case.

ATTACHMENT—GAMING AND GAMBLING.

[Superior Court of Cincinnati, October 1, 1908.]

EVERET R. BAKER v. MOREHEAD & Co.

ATTACHMENT LIES AGAINST A FOREIGN CORPORATION WITHOUT BOND TO RECOVER MONEY LOST ON A GAMBLING CONTRACT.

An order for attachment without bond may be had against a foreign corporation under Secs. 5521, 5523 Rev. Stat., in an action under Secs. 4269, 4272 Rev. Stat., for the recovery of money lost in a scheme of chance, commonly called a bucket shop, the transaction on which the action is based being a *quasi* or constructive contract.

[Syllabus approved by the court.]

Peck, Shaffer & Peck, for plaintiff:

Cited and commented upon the following authorities: *Northern Nat. Bank v. Mill Co.* 2 Dec. 67 (2 N. P. 260); *Dabney v. Pappenheimer Co.* 10 Circ. Dec. 803 (20 R. 707); *Annen v. Morris*, 7 Dec. Re. 304 (2 Bull. 94); *Columbus, H. V. & T. Ry. v. Gaffney*, 65 Ohio St. 104 [61 N. E. Rep. 152]; *Lester v. Buel*, 49 Ohio St. 240 [30 N. E. Rep. 821; 34 Am. St. Rep. 556]; *Kahn v. Walton*, 46 Ohio St. 195 [20 N. E. Rep. 203]; *Rogers v. Edmund*, 12 Circ. Dec. 291 (21 R. 675); *Warren v. Davis*, 43 Ohio St. 447 [3 N. E. Rep. 301]; *Ironton (City) v. Wichle*, 78 Ohio St. 41.

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Ernst, Cassatt & McDougall, for defendant.

SPIEGEL, J.

Plaintiff alleges that the defendant is a corporation under the laws of Ohio, maintaining a scheme of chance, commonly called a bucket shop; that between February 23, 1907, and September 10, 1907, he lost, expended and paid to the said defendant on account of said game of chance \$13,100, which sum the defendant received to the use of said plaintiff, and in which sum, together with exemplary damages in the sum of \$500, defendant is indebted to him.

Upon this petition, plaintiff obtained an order of attachment against the defendant without giving bond, and the case is now before me on a motion to discharge and set aside the order of attachment because no bond was given.

Section 5521 Rev. Stat. provides that plaintiff may have an attachment when a defendant is a foreign corporation, and plaintiff's claim arises upon a contract, judgment or decree, or for causing death or a personal injury by a negligent or wrongful act, and Sec. 5523 provides that when a defendant is a foreign corporation no undertaking need be given.

It is admitted that defendant is a foreign corporation, and that plaintiff's claim does not arise upon judgment or decree or from causing death or a personal injury. Does his claim then arise upon contract?

This action is brought under the provisions of Sec. 4269 Rev. Stat. *et seq.*, which provide that all promises, agreements, notes or other contracts when the whole or any part of the consideration of such promise, etc., is for money or other valuable thing whatsoever, won or lost upon any game of any kind, shall be absolutely void and of no effect; but any person who loses to another person any sum of money or thing of value in playing at any game or scheme of chance, or any citizen for him, may sue for and recover the same by civil action founded on this chapter, in which action it shall be sufficient for the plaintiff to allege that the defendant is indebted to the plaintiff in the sum so lost and paid.

Contracts are divided into three classes—express, implied and *quasi* or constructive. Only the first two fall under the class of true contracts, namely, an agreement or promise enforceable by law, as defined by Pollock. The third category applies to a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by public policy, and which are allowed to be enforced by an action *ex contractu*. These obligations, however, are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the

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semblance of contract for the purpose of the remedy. They are therefore called *quasi* or constructive contracts.

Possibly nowhere have these constructive contracts been better explained than by Judge Lowrie, in *Herzog v. Herzog*, 29 Pa. St. 465, 467. Quoting Blackstone, who knew but two classes of contracts, express and implied, he says:

"This is the language of Blackstone, 2 Comm. 443, and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions and are dictated only by their mutual and accordant wills. When this intention is expressed we call the contract an express one. When it is not expressed it may be inferred, implied or presumed from circumstances as really existing, and then the contract thus ascertained is called an implied one. The instances given by Blackstone are an illustration of this. But it appears in another place, 3 Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not under our variant notions of reason and justice, but the common sense and common justice of the country, and, therefore, the common law or statute law impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and an action brought in *assumpsit*. It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case, the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one the intention is disregarded; in the other it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have, therefore, in law three classes of relations called contracts: 1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied. 2. Implied contracts, which arise under circumstances, which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract. 3. Express contracts, already sufficiently distinguished."

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Also, Judge Graves who explains it historically in *Woods v. Ayers*, 39 Mich. 345, 348:

"In early times the want of a common law remedy suited to cases of nonperformance of simple promises caused frequent recourse to equity for relief; but at length in the 21st of Henry VII it was settled by the judges that an action on the case would lie as well for non-feasance as for malfeasance and in that way assumpsit was introduced. In theory it was an action to recover for non-performance of simple contracts and the formula and proceedings were constructed and carried on accordingly. Very early there were successful efforts to apply it beyond its import, and from the reign of Elizabeth 'this action has been extended'—as Mr. Spence informs us—'conscience encroaching on common law' to almost every case where an obligation arises from natural reason and the just construction of law, that is, *quasi ex contractu*, and is now maintained in many cases which its principles do not comprehend and where fictions and intendments are resorted to to fit the actual cause of action to the theory of the remedy. It is thus sanctioned where there has been no actual assumpsit—no real contract—but where some duty is deemed sufficient to justify the court in imputing a promise to perform it and hence in bending the transaction to the form of action. * * * This tendency to apply *assumpsit* to causes of action foreign to its original spirit and design is apparent in our legislation. The statute allows it to be brought on judgments and sealed instruments, also for penalties and forfeitures."

Coming now to the case at bar, it distinctly falls within the definition of a constructive contract. It makes gaming contracts unlawful and authorizes the loser to sue *ex contractu*. Section 4272 Rev. Stat. provides as follows:

"In the prosecution of such actions it shall be sufficient for the plaintiff to allege that the defendant is indebted to the plaintiff, or received to the plaintiff's use, the money so lost and paid, or converted the goods won of the plaintiff to the defendant's use, whereby the plaintiff's action accrued to him."

In *Meech v. Stoner*, 19 N. Y. 30, the court of appeals says:

"The principles involved in this question have been several times considered in the courts of England, and the question itself there determined. The statute of Anne (ch. 14) gave to the person losing at play an action of debt, at any time within three months, against the winner; and in the case of *Turner v. Warren* (2 Strange 1079), the question was whether, in an action founded on that statute, the defendant could be held to special bail, the defendant's counsel comparing it to penal actions where no bail was ever required. But the court held there ought to be special bail in the case, because 'the defendant was a debtor of the plaintiff'. The clause of the statute was

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considered as remedial and not penal. In *Bones v. Booth* (2 Wm. Blackstone 1226), the plaintiff sued to recover back seventeen guineas lost at play. The jury having found a verdict for the defendant, a motion for a new trial was made, for the reason that the verdict was against the evidence. This was resisted on the ground that there was no precedent for a new trial in a penal action. But the court said that the statute was not penal but remedial; and Sir William Blackstone observed, 'The statute makes the winning of £10 at any one time or sitting, a nullity, and therefore gives the loser an action to recover back what still properly continues to be his own money.'"

In *McDougall v. Walling*, 48 Barb. (N. C.) 364, 370, the court says:

"The winner of money by betting or gaming has so much belonging to the loser. The winner cannot defend himself against the claim of the loser by virtue of the gaming or betting contract under which he acquired the money, because the statute says the contract is void. The winner has so much money of the loser to which he has no title. The winner is in the condition of one who has found a sum of money belonging to another. There is an implied contract to pay it to the loser. So when money has been obtained by fraud or violence, the injured party may waive the wrong, and sue as upon a promise, the law implying a promise from the moral obligation. The injured party has a choice of forms of action. The statutes against betting and gaming demand a liberal construction. They are remedial, not penal."

In the case of *Kleimeyer v. Payne*, 15 Dec. 671, a case of money lost on betting on races, Judge Hoffheimer held:

"Were the petition in this action founded on this section the authorities cited by defendant, Payne, in support of his demurrer would be applicable. But Section 1956 (Ky. Stat.) is remedial in its nature; its purpose is not to punish the winner but to give to the loser the right to recover that which it is presumed was wrongfully taken from him. Its provisions are liberally construed (14 Am. & Eng. Enc. (2 ed.) 625). The right to recover under this section is founded in contract. The law declares that the defendant had no right to receive the amount in question. Having no right to receive, it is bound to return it to the owner, the person from whom he won it. In other words, the law imputes an implied contract that the money should be restored by the person who unlawfully obtained it."

The motion to dismiss the attachment must, therefore, be overruled.

Tannegas, In re.

TRUSTS—WILLS.

[Hamilton Common Pleas, 1908.]

JOHN H. TANNEGAS, IN RE EST.

DIRECTION TO POSTPONE PAYMENT OF ABSOLUTE BEQUEST DISREGARDED.

Where a bequest is absolute, a direction by the testator that payment thereof be postponed for five years is an attempt to establish a trust which is without effect, and an application for an order for immediate payment of the bequest will be granted.

[Syllabus approved by the court.]

APPLICATION to terminate trust.

Harper & Allen, and J. W. Curtis, for the application.

WOODMANSEE, J.

Under item three of the will of John H. Tannegas, dated August 13, 1906, he gives and bequeathes to his son, Barney Edward Tannegas, the sum of \$1,250, "said amount to be held by the executor for five years."

Under items four and five he gives and bequeaths to his sons, Frederick and William, \$750 each with the same conditions.

The executor under the will was succeeded by an administrator *de bonis non* with the will annexed on January 10, 1907, by appointment of the probate court of this county.

It is now represented to this court that said estate has been fully administered and that Barney Edward and Fred Tannegas are over twenty-one years of age and capable of caring for their business affairs and that the administrator, as trustee, holds certain sums of money for said legatees and he now applies to this court for authority to transfer said funds to said legatees.

Doubtless the testator had some reason satisfactory to himself, for postponing the time of control and enjoyment of these several bequests by the legatees mentioned.

However, in law, the bequests are absolute. The direction that these bequests be held by the executor for five years attempts to establish a trust without effect.

This is likewise true if such restrictions are placed upon a devise of real estate in fee simple. The policy of the law is to ignore them.

I quote from Gray, Restraints on Alienations Sec. 105:

"When the fee or absolute property in land or chattels is given to A, and there is a direction not to convey to him till he reaches a certain age, say thirty, but no other person has in any event any interest either in the principal or income, the direction to postpone is disregarded and

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A is entitled to a conveyance at once. He has an indefeasible fee or absolute interest, which he can sell or mortgage, and it is deemed against public policy to deprive an adult sane man or unmarried woman of the use of the land or goods in which he or she has an absolute and indefeasible property."

In the case of *Sears v. Choate*, 146 Mass. 395 [15 N. E. Rep. 786; 4 Am. St. Rep. 320], the court says:

"There is no doubt of the power and duty of the court to decree the termination of the trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination. Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have an interest in it, they are, in effect, the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it, unless some good cause appears to the contrary."

In the case of *Anderson v. Cary*, 36 Ohio St. 506 [36 Am. Rep. 602], Judge McIlvaine, page 515, says:

"By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force."

The clause of the will construed in this case was as follows:

"I give and bequeath the farm on which I now live, of two hundred and eighty-five acres, to my two sons, Thomas and Lincoln, upon the following conditions: I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or incumber said farm in any manner whatsoever, except in the sale to one another as aforesaid. *Held:*

"1. The devisees took a vested estate in fee simple. * * *

"2. The restraint attempted to be imposed on the power of the devisees to alien or incumber the estate was void, as repugnant to the devise and contrary to public policy."

The application filed herein is granted. The decree of the court will authorize the trustee to pay the sons who have arrived to the age of twenty-one their bequests; and the bequest to the minor son to invest until he arrives at the age of twenty-one, at which time such bequest may be paid to him.

Pease v. Pease Co.

CORPORATIONS—DEBTOR AND CREDITOR.

[Hamilton Common Pleas, 1908.]

C. H. PEASE V. PEASE CO.

CREDITOR CANNOT ARBITRARILY FIX PRICE FOR DISPOSAL OF CLAIMS.

A majority of the creditors of an insolvent company have neither the right to fix an arbitrary price at which all the creditors of the company must dispose of their claims, nor have they the right to form a new corporation, and compel each creditor to take stock in the new company in proportion to the amount which his claim bears to the whole indebtedness.

[Syllabus approved by the court.]

Albert Bettinger and Charles Barber, for the receiver.
Cohen & Mack, for the Peoples Bank & Savings Co.

O'CONNELL, J.

The Pease Company, defendant herein, passed into the hands of a receiver at the April term of this court, 1907. One dividend of 10 per cent has been declared and paid since that time.

A very large majority of the creditors of the company (approximately 97½ per cent) after holding numerous conferences have agreed on a plan for their mutual protection which provides, in brief, for the organization of a new company-whose stockholders will be the creditors of the old company, and which will take over the property of the old company, which will thereupon pass out of existence. The new company will carry on the same line of business as the old.

The stock of the new company will be allotted to the creditors in a ratio proportionate to their claims against the Pease Company. Such creditors as do not wish to take stock in the new company will be given notes payable in a series, and renewable if necessary for a period of five years. Such as wish neither stock nor notes will receive 25 per cent of their claims in cash in full settlement.

The rights of all creditors seem amply protected in the plan which is fully set forth in the pleadings. But the majority of the creditors of a company are without right to fix an arbitrary price at which all the creditors of the company shall dispose of their claims. Nor have they the right to form a new corporation and compel each creditor to take stock in the new company proportionate to the amount which each creditor's claim bears to the whole indebtedness. *Mason v. Mining Co.* 133 U. S. 50 [10 Sup. Ct. Rep. 224; 33 L. Ed. 524].

The proposition offered by the majority to the minority creditors in the case at bar appears to be fair and reasonable, but a court of equity is without power to enforce its provisions upon all creditors.

"The question of the wisdom and expediency of adopting any such

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scheme is for solution and determination by the persons interested, and no attempt to coerce their judgment or control their action should be made either by the court or the receivers." *Platt v. Railway*, 65 Fed. Rep. 872, 881.

Nor has the court the power to say that a master shall be appointed who shall determine the amount of the indebtedness of the company, and the amount of its assets and arbitrarily (albeit in his best judgment) fix the present cash market value of the assets of the company, and that then such creditors as are unwilling to accede to the agreement to form a new corporation shall take payment of their claims at the ratio which the amount of their claims bears to the whole amount of the indebtedness; and proportionate also to the accredited cash value of all the assets of the company. *Mason v. Mining Co. supra*. Although the court says, page 63:

"We do not say there may not be circumstances presented to a court of chancery which is winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them, and making a distribution to partners or shareholders on that basis; but this is not the general rule by which the property in such cases is disposed of in the absence of an agreement."

And in the case at bar a minority creditor, although it is but a small minority, refuses to enter on the agreement.

In so far as the case of *Hancock v. Railway*, 9 Fed. Rep. 738 (decided 1882), holds to the contrary (assuming that the facts in each case are identical) it must be considered that such holding is not sustained by the later adjudications cited above.

In view of the holding in the case of *Mason v. Mining Co.*, "that the affairs of the * * * company be and are hereby decreed to be wound up" and "all the assets and property of the * * * company be sold at public vendue for cash to the highest bidder," it seems that the only course left open to pursue in the case at bar is a similar one.

In an assemblage or conference of creditors while there is a community of interest, there is not that voluntary community of interest which is present in a voluntary association or compact, such a partnership or corporation.

Hence, while in the case of a corporation or a partnership, ordinarily the majority must yield to the minority in policies of management, except in case of fraud, no such reason exists for requiring disassociated individuals, such as creditors, to agree to what a majority of their number wishes.

The only common interest creditors have in an insolvent corporation, or an assigned individual or partnership, is that of securing a payment of their claims from the assets in the largest percentage possible.

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If counsel in the case are agreed that the services of a master are necessary to ascertain the respective rights and liabilities of any class of the creditors, or if on a hearing the court is satisfied that one is necessary, then one can be appointed, otherwise the receiver may proceed to effect the sale.

All creditors of the company can take such action as they deem best when the assets of the company are offered at such public sale.

TRUSTS AND TRUSTEES—WILLS.

[Montgomery Common Pleas, September, 1908.]

FIRST GERMAN REFORMED CHURCH v. WEIKEL ET AL.

1. GIFT TO RELIGIOUS DENOMINATION IS A PUBLIC CHARITY.

The fact that a gift is made to a particular religious denomination does not deprive it of its character as a public charity or eliminate it from the rule which applies to gifts for pious uses.

2. DISPOSAL OF PROPERTY DEVISED FOR USE AS A PARSONAGE.

Where the gift is in the form of a parsonage, and the property enhances greatly in value and becomes unsuitable for its original purpose by reason of the encroachments of business, the church may sell the property and invest so much of the proceeds as is necessary to provide a new parsonage in another locality, and may, under the doctrine of *cy pres* treat the balance remaining on hand as a maintenance fund for keeping the newly acquired property in repair and making necessary improvements and paying taxes.

3. APPLICATION OF PROCEEDS OF SALE OF PROPERTY OF PUBLIC CHARITY NOT REQUIRED OF PURCHASER.

The purchaser of property, thus sold under the direction of the court, is not bound to see to the application of the proceeds.

[Syllabus by the court.]

Kenedy, Munger & Kenedy, for plaintiff:

Cited and commented upon the following authorities: *Cincinnati v. McMicken*, 3 Circ. Dec. 409 (6 R. 188); *LeClercq v. Gallipolis (Tr.)*, 7 Ohio (pt. 1) 217 [28 Am. Dec. 641]; *Webb v. Moler*, 8 Ohio 548; *Jackson v. Phillips*, 96 Miss. (14 Allen) 539; *Price v. Maxwell*, 28 Pa. St. 35; *Sowers v. Cyrenius*, 39 Ohio St. 29 [48 Am. Rep. 418]; *Mannix v. Purcell*, 46 Ohio St. 102 [24 N. E. Rep. 595; 2 L. R. A. 753; 15 Am. St. 562]; *Davis v. Camp Meeting*, 57 Ohio St. 257 [49 N. E. Rep. 401]; *Mack's Appeal*, 71 Conn. 122 [41 Atl. Rep. 242]; *Dexter v. Gardner*, 89 Mass. (7 Allen) 243; *Gilmour v. Pelton*, 5 Dec. Re. 447 (2 Bull. 158), affirmed, no report, *Pelton v. Gilmour*, 10 Bull. 432; *Gerke v. Purcell*, 25 Ohio St. 229; *Humphries v. Little Sisters*, 29 Ohio St. 200; *Beckwith v. Rector*, 69 Ga. 564; 2 Perry, Trusts Sec. 701, 794; *Allen v. Stevens*, 161 N. Y. 122 [51 N. E. Rep. 568]; *Kingsbury v. Brandegee*, 113 App. Div. 606 [100 N. Y. Supp. 353]; *Penneyer v. Wadhams*, 20

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Ore. 274 [25 Pac. Rep. 720]; *Baldwin v. Baldwin*, 7 N. J. Eq. 211; *Attorney General v. Chester*, 1 Bro. Ch. 444; *McIntire v. Canal Co.* 17 Ohio St. 352; *McIntire v. Canal Co.* 9 Ohio 203; *Gilman v. Hamilton*, 16 Ill. 225; *Clyde v. Simpson*, 4 Ohio St. 445; *Eberly's Appeal*, 95 Pa. St. 95; *Jackson v. Phillips*, 96 Mass. (14 Allen) 539; 1 Perry, *Trusts* Sec. 384; 5 Enc. Law (2 ed.) 902, 942; *O'Neal v. Caulfield*, 8 Dec. 248 (5 N. P. 149); *Odell v. Odell*, 92 Mass. (10 Allen) 6; *Ashworth v. Carleton*, 12 Ohio St. 381.

SNEDIKER, J.

This case comes before the court on a petition for the construction of certain clauses of the will of Catherine Weikel, and for the further purpose of quieting the title to certain property now held by the plaintiff church. The clause of the will asked to be construed is as follows:

"I give, devise and bequeath to the First German Reformed Church of the city of Dayton, Ohio, all that portion of in-lots numbered 223 and 224 as designated in the plat of the city of Dayton, in the county of Montgomery, state of Ohio, being the same premises conveyed by John Sheets and Savila Sheets, his wife, to me by deed dated October 15, 1864, recorded in Book T, No. 3, pages 400 and 401 of the records of Montgomery county, Ohio (reference being had to said deed for a more particular description of said premises), to be by said church occupied as a parsonage for the residence of the pastor of said church perpetually, or in case a change of location be deemed advisable at any time, the same may be sold and the proceeds appropriated to another parsonage."

Doubt is entertained by plaintiff in these respects:

1. Plaintiff is in doubt as to the true construction of the clause therein as follows: "To be by said church occupied as a parsonage for the residence of the pastor of said church perpetually, or in case a change of location be deemed advisable at any time, the same may be sold and the proceeds appropriated to another parsonage."

2. Plaintiff is in doubt as to whether the entire proceeds, on a sale being had of said premises, must be used in the purchase and erection of another parsonage, or whether a portion of said proceeds may be used as a fund for maintaining such other parsonage, for repairing and improving same, and for paying the taxes, insurance and other expenses thereof, or whether some other application of said proceeds is required under the will.

3. Plaintiff is in doubt as to whether a purchaser of such real estate is required to see to the application of the purchase money.

The testimony in the case showed that for a period of more than twenty-one years the subject of the above devise has been in continued use by said church as a parsonage, and is now so used. At the time the

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church entered into possession the part of the city in which it is located was a residence district; but at this time it is in the very business center of the city, so that instead of being as it then was, a desirable site for the purpose intended, noise, dirt and other improper surroundings have rendered it almost totally unfit therefor.

Further, the value of the property at first occupancy was about \$3,000. Since then the growth of the city and the use of surrounding property for commercial purposes has enhanced its worth, so that now it should bring from \$20,000 to \$25,000.

The plaintiff church has a membership of about seven hundred persons, and recognizes the fact that this parsonage is both undesirable for its intended use, and is an expensive luxury.

The purpose of this proceeding, if it may be done, is to sell the parsonage and rebuild at less than the selling price in a proper location, using the balance of the fund created by the sale and left after building or buying in such a way as to carry out the intention of the testatrix.

It appears also as a matter of fact in the case that an investment of the amount of the value of this property in a parsonage for the use of the pastor of said church, would impose upon him the burden of maintaining an establishment far in excess of what his income as such pastor would warrant.

Our first inquiry is as to the character of the gift. The language of the will is as before quoted. Undoubtedly it is a gift to pious uses.

In *State v. McDonogh*, 8 La. 171, 246, the court defines legacies to pious uses in the following language:

"Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the merit of the legatees might procure to them. In this motive consists the distinction between these and ordinary legacies. The term pious uses includes not only the encouragement and support of pious and charitable institutions, but those in aid of education and the advancement of science and the arts. They are viewed with special favor by the law and with double favor on account of their motives for sacred usages and their advantages to the public weal."

In *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556, the court defines a charity as follows:

"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or

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works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

In *Price v. Maxwell*, 28 Pa. St. 25, 35, the case of *Price et al. v. Maxwell et al.*, the court say:

"If we were to attempt a definition which would embrace all gifts for charitable uses, we should adopt the language of the eminent patriarch of our profession, Mr. Binney, as expressed in his argument in *Vidal et al. v. The City of Philadelphia*, 'whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private or selfish,' is a gift for charitable uses according to that religion from which the law of charitable uses has been derived."

It is apparent from the foregoing that the gift in question is a public charity; and the fact that the gift is to a particular denomination does not deprive it of its public character.

In *Mack's Appeal*, 71 Conn. 122, 135 [41 Atl. Rep. 242], the court uses the following language:

"The maintenance of religious services in accordance with the views of any denomination of Christians is a public charity, within the meaning of our statute of charitable uses. We recognize the right of every man to establish foundations and charities to promote his own or any other peculiar religious opinions."

In *Gilmour v. Pelton*, 5 Dec. Re. 447, 454 (2 Bull. 168; 6 Am. Law. Rec. 26), the court say:

"A Presbyterian church is no less a place of public worship because Baptists, Catholics, Unitarians or Jews may not choose to worship therein. And our Supreme Court, in discussing a similar case, says: 'For the purpose of determining the public nature of the charity, it is not material through what particular form the charity may be administered, if it is established and maintained for the benefit of the public, and so constituted that the public can make it available. This is all that is required.'"

In *Beckwith v. Rector*, 69 Ga. 564, 570, the court say:

"The support and propagation of religion is clearly a charitable use, and this includes gifts for the erection, maintenance and repair of church edifices of worship, the support of the ministry, etc., 2 Pomeroy. Equity 587-8; Law of Trusts (Tiffany & Bullard), 232, 236, 239, 240.

Perry, Trusts Sec. 701, contains the following:

"Both before and since the statute (referring to the statute of Elizabeth), gifts for the advancement, spread, and teaching of Christianity, or for the convenience and support of worship, or of the ministry have been held to be charitable."

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These authorities further satisfy the court that the gift of this parsonage is a charity. That having been ascertained, what becomes of the fund realized on the sale of this property if a sale is had under the power given in the will?

In addition to the facts already stated, it appeared from the evidence that a suitable parsonage for this church should not cost more than \$10,000. There would remain, therefore, a balance, after the purchase of such a parsonage, a fund of at least \$10,000 or more to be applied and disposed of. The question is, how shall this be done? If at all it must be under the doctrine of *cy pres*.

By this doctrine, "Where the literal execution of the trusts of a charitable gift is inexpedient or impracticable, a court of equity will execute them, as nearly as it can, according to the original plan. The general principle upon which the court acts is that, if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be executed shall not destroy the charity; but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." Eaton, Equity 393.

This doctrine of charitable trusts as applying to the jurisdiction of equity is in force at least in its essential features in the state of Ohio. This is illustrated in the case of *McIntire v. Zanesville*, 17 Ohio St. 352. Also by the case of *LeClercq v. Gallipolis (Tr.)*, 7 Ohio (pt. 1) 217 [28 Am. Dec. 641]; in that case the court by way of quotation says:

"If the object of its [trust] creation can be attained, the court of chancery will enforce its execution. Where circumstances are so changed, that the direction of the donor prescribing the use, cannot be literally carried into effect, the legislature or the court, in those cases where general intention can be effected, may lawfully, in some cases, enforce its execution as nearly as circumstances admit, by the application of the doctrine of *cy pres*. *Moggridge v. Thackwell*, 7 Ves. 36; *Cary v. Abbot*, 7 Ves. 490; *Morice v. Durham*, 9 Ves. 405; *Attorney General v. Baxter*, 1 Vern. 248; *Attorney General v. Hurst*, 2 Cox 365."

In *Academy of the Visitation v. Clemens*, 50 Mo. 167, the court say:

"Where lands are vested in a corporation by devise for charitable purposes, and it is contemplated by the donor that the charity should last forever, the heirs can never have the lands back again. If it should become impossible to execute the charity as expressed, another charity will be substituted by the court so long as the corporation exists."

In Adams, Equity (3 Am. ed.), 234, 235, we find the following:

"If in a gift to charity the intended object * * * ceases to

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afford the means of applying the entire fund the presumed general object will be effectuated by the doctrine of *cy pres*, i. e., an application to some other purpose, having regard as nearly as possible to the original plan."

In the case of *Harper v. Trust & Safe Deposit Co.* 11 Dec. 240 (8 N. P. 157), we find the following:

"It is not necessary that the object of the trust should cease entirely to exist, or that the express trust should become absolutely impossible of application before the doctrine of *cy pres* can be invoked."

2 Lewin, Trusts 688, lays down the rule that: "The management of the trust may contravene the letter of the founder's will, and yet on a favorable construction, be conformable to the intention."

"Among the charitable trusts which have been most liberally construed and most uniformly sustained have been those created for the promotion of religion and education." *Sowers v. Cyrenius*, 39 Ohio St. 29, 35 [48 Am. Rep. 418].

"The great consideration which the law attaches to these legacies, controls tribunals in the interpretation of them, and has secured for their support a doctrine of approximation which is coeval with their existence." *State v. McDonogh*, 8 La. 171, 246.

In the case at bar, if this property is sold, as it may be sold under the power given in the will and found in the clause already referred to, a fund is created which, under the terms of the will, should be reinvested in another parsonage. The needs of this church are such and the circumstances generally are such that the application of this whole fund to the purchase of a parsonage is wholly unnecessary and uncalled for. Whatever balance is left after satisfying the needs of the church by the purchase of a proper parsonage comes within the rule here laid down by Adams and within the doctrine of *cy pres* as already defined by the authorities quoted. A wise disposition of any surplus fund, therefore, would be its use for the maintaining of the parsonage purchased, for repairing and improving the same, and for paying the taxes, insurance and other expenses thereon, and such use will be approved by the court.

The only remaining question on the part of counsel with reference to the will is as to whether a purchaser of the real estate in question is required to see to the application of the purchase money.

2 Lewin, Trusts 597, lays down the rule as follows:

"If a sale be directed, and the proceeds are not simply to be paid over to certain parties, but there is a special trust annexed, the inference is, that the settlor meant to confide the execution of the trust to the hands of the trustee, and not of the purchaser, and that the trustee therefore can sign a receipt."

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This rule is supported by the case of *Clyde v. Simpson*, 4 Ohio St. 445.

2 Perry, Trusts Sec. 794, says:

"If a sale is directed, but the proceeds are not to be paid over to the *cestuis que trust*, but are to be held by the trustees upon some special trusts. In such case the implication is plain, that the settlor intended to confide the execution of the trust to the trustees, and that they have power and authority to receive the trust fund and to give receipts. Power of sale and reinvestment relieves the purchaser of any burden of looking after the application of the money."

"When the object of the trust is defined, but the purchase money is to be reinvested upon trusts requiring time and discretion, the purchaser is not bound to see to the application thereof."

"Where trustees under a will have power to sell, in their discretion, and re-invest the proceeds on the same trusts, a purchaser from them is not bound to see to the application of the purchase money."

It is apparent from the above authorities that a purchaser of real estate devised by defendant's testatrix to this church is not required to see to the application of the purchase money.

With reference to the quieting of the title to said real estate, the court being satisfied that the same should be done, it is accordingly ordered.

Let an entry be drawn in conformity to these findings of the court.

INTOXICATING LIQUORS—SUNDAY LAWS.

[Clark Common Pleas, 1907.]

*JOHN JUNG v. STATE.

VIOLATION OF SUNDAY CLOSING AND SUNDAY SELLING LAW CONSTITUTE FIRST AND SECOND OFFENSES.

Under Sec. 4364-20 (Lan. 7259) Rev. Stat., the unlawful sale of intoxicating liquors on Sunday, and unlawfully allowing a place where intoxicating liquors are sold to remain open on Sunday, are merely different forms of committing the same legal offense. Hence, the unlawful sale of intoxicating liquors on Sunday can be charged as a second offense, when the first conviction relied upon was for unlawfully allowing a saloon to remain open on Sunday.

[Syllabus approved by the court.]

ERROR to Clark probate court.

M. T. Burnham and Charles Ballard, for plaintiff in error:

Cited and commented upon the following authorities: *Hall v. State*, 20 Ohio 7; *Shultz v. Cambridge*, 38 Ohio St. 659; *State v.*

*Affirmed by the circuit court, without report, December, 1907.

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Meyers, 56 Ohio St. 340 [47 N. E. Rep. 138]; *Hargo v. Meyers*, 2 Circ. Dec. 543 (4 R. 275); *State v. Fertilizer Co.* 24 Ohio St. 611; *State v. Fennessy*, 22 Bull. 198; *Commonwealth v. Martin*, 17 Mass. (16 Tyng) 359; 12 Cyc. Law & Proceed. 949; *Hughes*, Crim. Law Sec. 3293; *Scot v. Turner*, 1 Root (Conn.) 163; *Kite v. Commonwealth*, 52 Mass. (11 Met.) 581; *Commonwealth v. Hope*, 39 Mass. (22 Pick.) 1; *Long v. State*, 36 Tex. 6; *Carson v. State*, 108 Ala. 35 [19 So. Rep. 32]; *Commonwealth v. Fontain*, 127 Mass. 452; *State v. Haynes*, 36 Vt. 667; *State v. Freeman*, 27 Vt. 523.

J. M. Cole, for defendant in error:

Cited and commented upon the following authorities: *State v. Haynes*, 36 Vt. 667; *State v. Sawyer*, 67 Vt. 239 [31 Atl. Rep. 285]; 11 McClain, Criminal Law Sec. 1268, p. 445.

KUNKLE, J.

The plaintiff in error was tried in the probate court of this county. He was charged with violating Sec. 4364-20 Rev. Stat., and was convicted as for a *second offense*.

Various errors are complained of in the petition in error.

Upon the hearing of this case, counsel for plaintiff in error especially urged the fact that his client had been improperly charged, convicted and sentenced as for a *second offense*; that the former conviction of the plaintiff in error was for "unlawfully allowing his saloon to remain open on Sunday," whereas the present charge is for "unlawfully selling intoxicating liquors on Sunday."

The question presented for determination therefore is, can an "unlawful sale of intoxicating liquors on Sunday" be charged as a *second offense* when the first conviction relied upon was for "unlawfully allowing his saloon to remain open on Sunday."

Section 4364-20 (Lan. 7259) Rev. Stat., provides:

"The sale of intoxicating liquors, whether distilled, malt or vinous, on the first day of the week, commonly called Sunday, except by a regular druggist on a written prescription of a regular practicing physician for medical purposes only, is hereby declared to be unlawful, and all places where such intoxicating liquors are on other days sold or exposed for sale, except regular drug stores, shall on that day be closed, and whoever makes any such sales, or allows any such place to be open or remain open on that day shall be fined in any sum not exceeding one hundred dollars and not less than twenty-five dollars for the first offense, and for each subsequent offense shall be fined not more than two hundred dollars or be imprisoned in the county jail or city prison not less than ten days and not exceeding thirty days, or both."

This section was evidently enacted by our legislature to restrain

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the evils which result from trafficking in intoxicating liquors on Sunday, and this evident purpose of the legislature should be kept in mind in attempting to construe the section in question.

The purpose of the legislature was to keep such places actually closed as against the public on Sunday. If such places are kept actually closed, then no evils can result therefrom by persons buying liquors thereat or being therein.

The section provides, among other things, that "all places where such intoxicating liquors are on other days sold or exposed for sale, except regular drug stores, shall on that day be closed." If such places are actually closed on Sunday, then, of course, no sales can be made at such places of business.

The section does provide that it shall be an offense to make any such sales or allow any such places to be open or to remain open on Sunday, but it will be noted that the penalty is single; that is, there is but one penalty for *any violation* of the provisions of the section, whether such violation consists of selling or allowing such place to be open or remain open.

For the first offense against the act in question, whether such offense consists of selling or allowing such place to be open or remain open, the penalty is a fine of not less than \$25 nor more than \$100.

For each subsequent offense against this act, the penalty consists of a fine of not more than \$200 or imprisonment or both.

The language of the section is, "for each subsequent offense." We think this means for each subsequent offense against the act in question, whether such offense consists of "unlawfully selling," or "unlawfully allowing such place to be open or remain open on Sunday."

The legislature has evidently intended to provide a more severe punishment for a second violation of any of the provisions of the act in question.

If this section read, "for each subsequent offense of the same exact nature" then the contention of counsel for plaintiff in error would be justified, but in view of the language used it seems evident that the legislature meant to notify offenders not to commit a subsequent offense against any of the provisions of the act in question.

The fact that the legislature has joined two distinct offenses in the same act and has provided but one penalty for a first violation of any of the provisions of such act, and has further provided but one greater or more excessive penalty for "each subsequent offense," would seem to indicate that these two separate criminal acts are to be treated as one offense, in so far as the penalty is concerned.

We have not been able to find any Ohio decisions upon this question.

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The principle determined in the case of *State v. Sawyer*, 67 Vt. 239 [31 Atl. Rep. 285], is applicable to the case at bar. The second paragraph of the syllabus of this case is as follows:

"In a prosecution under R. L. Section 3802, as amended by No. 42, Acts 1888, for keeping intoxicating liquors with intent to sell, a previous conviction for selling may be shown to enhance the penalty."

The court says:

"These are different forms of committing the same legal offense,—violating the act."

In *State v. Haynes*, 36 Vt. 667, the court holds that:

"Where the former conviction is for a sale, the increased penalty is incurred by a subsequent offense of furnishing. Selling, furnishing or giving away are but different forms for committing the same legal offense in violation of the liquor act; and a conviction for violating the statute in one of these forms, is available to double the penalty on a second conviction for the violation of another."

In McClain, Criminal Law, Sec. 1268, it is stated that:

"A second violation means a violation of the law after conviction for a prior offense, of the same character. All the acts of illegal selling before a first conviction constitute but one offense; at any rate there must be evidence of a prior conviction before there can be conviction of a second offense. A second offense does not necessarily consist in the same form of violation of the statute, but if the statute prohibits the selling, furnishing or giving away, a conviction for selling is available to double the penalty if there is a subsequent conviction for furnishing."

In the case at bar, we think "an unlawful sale of intoxicating liquors on Sunday," and "unlawfully allowing such place to be open or remain open on Sunday" are merely different forms of committing the same legal offense against the act in question, and that the plaintiff in error was properly charged, convicted and sentenced as for a *second offense*.

Schott & Sons Co. v. Insurance Co.

CORPORATIONS—INSURANCE.

[Hamilton Common Pleas, April 30, 1908.]

***J. M. SCHOTT & SONS CO. v. SECURITY MUT. LIFE INS. CO. ET AL.**

1. CORPORATION CANNOT INSURE PERSONS IN WHICH IT HAS NO INSURABLE INTEREST.

A corporation, organized to carry on a general coöperage business, has no authority to use its funds for the purpose of mere speculation in life insurance; nor power to take out insurance upon the life of any person in which it has no insurable interest.

2. COOPERAGE CORPORATION CANNOT INSURE DIRECTORS.

A solvent coöperage company has no insurable interest in its directors, none of whom are indebted to it, nor can it by its secretary and manager or by the acts of its directors, acting individually and not ratified as a board, obligate itself to insure their lives for the benefit of the corporation if it is in existence at the time of their death or at the end of twenty years, otherwise the proceeds to go to the personal representatives of the insured.

3. CORPORATION ENTITLED TO REFUNDER OF INSURANCE PREMIUMS ON DIRECTOR'S POLICIES.

A life insurance agent will be presumed to know that a corporation has no insurable interest in its directors, and having secured such business by his misrepresentations, the corporation will be entitled to demand a rescission of the contract, a cancellation of the policies and refunder of the premiums paid.

4. CORPORATION NOT IN PARI DELICTO BECAUSE INSURANCE AGENT GRANTED PREMIUM REBATES.

A corporation in an action against an insurance company to cancel life insurance policies on, and refunder of premiums paid for, unauthorized insurance on its directors, will not be deemed *in pari delicto* with the insurance agent because of rebate of premiums.

[Syllabus approved by the court.]

Five of the directors of the J. M. Schott & Sons Company insured their lives in the Security Mutual Life Insurance Company, for the benefit of the corporation if in existence when death should occur or at the end of twenty years, otherwise payable to the executors or administrators of the persons whose lives were insured. The premium was to be paid by the company, and was so paid for the first two years by the company's notes. This was done without the knowledge of the president of the corporation, who held a majority of its stock, and without the knowledge of the other stockholders, and it was not done at a meeting of either the directors or the stockholders.

The John M. Schott & Sons Co. was incorporated to manufacture general coöperage. The evidence showed that the persons insured were not indebted to the company, and were not under any pecuniary obligation whatever to the company. The stockholders and directors of the company are all members of the family of its founder, the late John

*Affirmed, *Security Mutual Life Insurance Co. v. J. M. Schott & Sons Co.*
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M. Schott, and consist of his wife, his daughters and his sons. Four sons whose lives were insured were actually engaged in the management of the business of the corporation, and had been so engaged with their father and for the corporation for a great number of years. Only one directors' meeting a year is usually held and the entire management and control of the business has been, by common consent, delegated to Christian Schott, who is the secretary and general manager of the company. The policies were for \$5,000 each, and were written for the benefit of the John M. Schott & Sons Company.

The action was to enjoin A. Wolfsohn, one of the defendants, an agent of the Security Insurance Company, from negotiating a note of the John M. Schott & Sons Company, executed by Christian Schott, secretary and manager, which had been given to said Wolfsohn in payment for the premiums for two years on said policies. The petition prayed in the alternative that if said Wolfsohn had already negotiated said note to a *bona fide* purchaser for value without knowledge, then the plaintiff might recover the amount of said note from the said insurance company.

J. J. Gasser, for plaintiff.

Herron, Gatch & James, for defendant.

Renner & Renner, for bank.

Rogers Wright, for A. Wolfsohn.

Smith, Simonton & Hawke, for C. B. Smith, trustee.

BROMWELL, J.

1. The board of directors of a corporation is its agent for carrying on the business for which said corporation was created.

2. The articles of incorporation prescribed, among other things, the purpose for which the company is incorporated.

3. Neither the company, nor its agents or board of directors acting in its behalf, has authority to transact any business or to do any act in relation thereto except such as are authorized in its charter or are reasonably necessary and proper for the performance of its authorized business.

4. A company authorized to carry on a general coöperage business would have no authority to use its funds for the purpose of mere speculation in life insurance, nor to take out insurance upon the life of any person where it has no insurable interest therein.

5. While there might be cases where it would be proper for a corporation to procure and maintain insurance upon the life of one or more of its directors (as, for instance, where the said director is indebted to the company and the insurance so taken is for the purpose of securing said indebtedness), the evidence in the present case shows no such relation of any of the directors to the company as would authorize

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it to take out such insurance or attempt to create an insurable interest on behalf of the company in the life or lives of any of its directors.

6. Within the scope of their authority the directors acting as a board bind the company by their acts; outside of the scope of their authority such acts are void except where the right of innocent persons dealing in good faith with said board of directors are involved.

7. Except for the transaction of minor and usual details of the business of the company, any important action outside of its regular and everyday business should be first authorized by the board of directors, and their action thereon be noted on the minutes of the board and made a matter of record.

8. The separate and individual action of one or more, even all, of said directors is not the action of the board and will be of no effect unless subsequently ratified at a meeting of the board.

9. In the present case, the business of the company was coöperage, the making and selling of barrels, etc.; none of its directors was indebted to it; the business itself is solvent; there is no evidence to show that upon the death of any of its directors or his removal or withdrawal from the business it would suffer any serious or lasting detriment thereby. Under these circumstances the taking out of insurance on the lives of its five directors was not necessary for the carrying on of its authorized business, nor was it a necessary or proper incident thereto.

10. The action of said individual directors in causing their lives to be insured and giving the note of the company to pay the premium on the policies issued was never authorized or ratified by them as a board, and did not bind the company unless by such action innocent parties dealing with them in good faith were misled.

11. The evidence shows in this case that the agent for the insurance company, knowing the character of the business transacted by plaintiff, himself first suggested and urged the taking out of said insurance, citing the cases of others who had taken insurance for the benefit of the business in which they were engaged, and held out to said directors the probability of a large profit to the company by such investment of its funds. It may be presumed from the evidence that said agent knew as a matter of law that the plaintiff had no insurable interest in the lives of said directors, and that the giving of the note of said company was without consideration.

12. Said insurance agent must also have known as a matter of law, from the terms of the policies issued, that a fraud was being perpetrated on the other stockholders of said company whose lives were not similarly insured, by reason of the fact that the company was to pay the premiums on said policies, thus using money partly belonging to said other stockholders who would reap no benefit therefrom in

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case the company went out of existence within the period of twenty years, and that said insurance at the end of that time would be payable to the estate or estates of the five insured stockholders and would be of no benefit to any of the others.

I conclude, therefore, that the directors had no authority to take out said policies; that plaintiff had no insurable interest in the lives of the insured; that the note given for premium was without consideration; and that the agent of the insurance company knew these facts and the law in relation thereto.

I am also of the opinion that the statements made by said insurance agent in soliciting said insurance were misleading and intended to deceive the insured, and did deceive them as to the fund deposited with the Insurance Department of New York for the protection of the policies issued by said company, and that this deception was one of the inducements which led said directors to take out said insurance, so that even if said directors should have had authority to bind the company by any such action, if the same had been free from deceit or misrepresentation, said company would under the circumstances of this case be entitled to demand a rescission of the contract, the cancellation of the policies and a refunder of the amount of the premium paid by it.

As to the alleged misrepresentation in regard to the probable large increase in value of said policies by the end of the term, there is some evidence to the effect that said policies might, under exceptional circumstances, work out as represented, but the preponderance of the evidence would go to show that such statements were not likely to be verified by actual results. As there may be some question, however, whether such statements of future results may not have been a mere expression of opinion, we do not take them into consideration.

Nor do we take into consideration the claim that there was a violation of the law in the matter of allowing rebates upon the premium, and that the plaintiff was *in pari delicto* with defendant. Looking upon the act of the individual directors in taking out the insurance as being unauthorized and not binding on the company, we cannot say that the latter was at fault by reason of any transactions involving a rebate of the premium.

Judgment will be given to plaintiff to recover the amount paid by it on its note discounted by the Brighton German Bank Co. with interest and costs, upon the surrender by plaintiff to the defendant, the Security Mutual Life Insurance Co., of the said policies for cancellation.

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DESCENT AND DISTRIBUTION—TRUSTS—WILLS.

[Williams Common Pleas, March 9, 1908.]

*SIMEON GILLIS, ADMR. v. HARRIET H. LONG ET AL.

1. STATUTORY RULE OF CONSTRUCTION NOT A RULE OF PROPERTY.

Section 5970 Rev. Stat., providing that "every devise of lands * * * shall be construed to convey all the estate of the devisor therein," etc., is a rule of construction only and not of property; it is to be employed to aid in ascertainment of testator's intention and disregarded when subversive thereof.

2. DEVISE DESIGNATED BY WRONG PLAT AND WRONG NUMBER FAILS WITH NONE BUT EXTRINSIC EVIDENCE.

The maxim, *falsa demonstratio non nocet*, does not apply to a devise of "lot 25 in Edgerton's addition," in which testator had no title or interest, and precludes a correction in the description thereof to "lot 22 in Bostator's addition," owned by testator, neither designation of plat nor number of lot in the will being correct upon which to base extrinsic evidence of testator's intention.

3. DISTRIBUTION OF UNDEVISED PROPERTY.

Testator having died intestate as to certain lands owned by him, leaving a widow, an unmarried son and a married son, and the unmarried son dies devising his interest therein to his mother and subsequently the other son dies survived by his widow and mother, the mother takes an estate in fee simple in the undivided one-half and dower in the remaining moiety and the widow of the married son, by virtue of Sec. 4158 Rev. Stat., will have a life estate in the other undivided one-half subject to her mother-in-law's dower therein with remainder in fee to the heirs of the brothers of the deceased ancestor.

4. LIEN OF LEGACY UPON ESTATE IN REMAINDER NOT CHARGEABLE AGAINST LIFE ESTATE.

The lien of an elder son's legacy upon a farm devised to a younger son with an unqualified life estate therein in testator's widow is not (1) a charge against such life estate, (2) nor payable until after the termination of the life estate.

5. LEGACY OF ESTATE IN TRUST IN REMAINDER VESTS UPON DEATH OF TESTATOR IN LEGATEE.

A legacy payable to an older son of testator which is made a lien upon a devise of a farm to testator's widow for life and after her death to a younger son, although payment may be postponed until the life estate terminates, vests at the death of testator and therefore does not lapse upon the death of the legatee before his mother, nor exonerate the farm

*Decision of the Williams circuit court, on appeal, May, 1908.

WILDMAN, J.

In the case of *Gillis, Admr., v. Long et al.*, we have considered the pleadings and evidence, together with the able and elaborate arguments and very numerous briefs that have been submitted to us, but we will not spend much time in announcing our conclusions. We have spent much time in the consideration of the questions involved, but we are so well satisfied, after the examination of the whole matter, with the views entertained by Judge Killits as announced in his opinion, that we are disposed to adopt them in their main features, and base our judgment thereon. The same decree as that rendered by Judge Killits below will be rendered in this court, and the will of George Long should bear the construction placed upon it by the court below. I think I need say nothing further.

Parker and Kinkade, JJ., concur.

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from its incumbrance; nor does the fact that the legacy is put in trust operate to change the estate bequeathed from a vested to a contingent one.

6. TRUST IMPOSING DISCRETIONARY DUTY ON TRUSTEE TO CONVEY TO CESTUI QUE TRUST UPON PERFORMANCE OF CONDITIONS PRECEDENT.

A trust imposed by will upon a brother of testator for the use and benefit of a son of testator, directing the trustee, upon the son's giving evidence "that he has become economical and industrious" to convey the property to him, but if he does not give evidence of "habits of industry, prudence and economy" as would "justify him in so conveying" the property devised, to hold the property and apply the net proceeds to the maintenance of the son, is a trust to manage the property during the pendency of the relation and one to clothe the *cestui que trust* with absolute title in the discretion of the trustee upon performance of the conditions precedent to its termination.

7. TRUST VESTING ESTATE IN CESTUI QUE TRUST SUFFICIENT TO PASS TITLE BY WILL.

A trust reposed in the discretion of testator's brother, a man sixty-five years of age, to transfer the remainder after the life estate of testator's widow in certain property to testator's son, aged thirty, upon the latter's performing certain conditions precedent as to habits and state of mind, and no provision being made for a successor upon the first trustee's death, is personal to the trustee and dies with him; and no provision being made for the devolution of the property either directly or in a residuary clause of the will creating the trust, the *cestui que trust* is vested with such an estate therein as will enable him to pass it by will upon his death.

[Syllabus approved by the court.]

O. C. Beechler, for the administrator.

Edward Gaudern, for the Northwestern Mut. Life Ins. Co.

R. L. Starr, C. A. Bowersox and Lyman & O'Connor, for defendant, Anna Tressler Long.

Newcomer & Gebhard, for Harriet H. Long:

All of the title to the \$3,000 legacy, to lot 25, and to the undivided one-third of the remainder estate in the brick block vested in the trustee and *cestui que trust*. George E. Long did not die intestate as to any part of his property. This property vested at the death of the testator. *Canfield v. Canfield*, 118 Fed. 1 [55 C. C. A. 169]; *Given v. Hilton*, 95 U. S. 591 [24 L. Ed. 458]; Page, Wills 466; 30 Am. & Eng. Enc. Law (2 ed.) 735; *Neely v. Phelps*, 63 Conn. 251 [29 Atl. Rep. 128].

The property devised and bequeathed to John W. Long in trust for Parker vested in Parker and in a trustee upon the death of the testator. *Kelly v. Jefferis*, 2 Del. 286 [50 Atl. Rep. 215]; *Powers v. Rafferty*, 184 Mass. 85 [67 N. E. Rep. 1028]; *Chauncey v. Francis*, 181 Mass. 513 [63 N. E. Rep. 913]; *Doe v. Considine*, 73 U. S. (6 Wall.) 458 [18 L. Ed. 869]; *Canfield v. Canfield*, 118 Fed. Rep. 1 [55 C. C. A. 169]; *McArthur v. Scott*, 5 O. F. D. 357 [113 U. S. 340; 5 Sup. Ct. Rep. 652; 28 L. Ed. 1015]; *Siegwarth's Estate*, 33 Pa. Super. Ct. 627; *Twilley v. Toadvine*, 66 Atl. Rep. 1030 (Md.); *Neely v. Phelps*, 63 Conn. 251 [29 Atl. Rep. 128]; *Linton v. Laycock*, 33 Ohio St. 128; *Noble v. Birnie*, 65 Atl. Rep. 823; *Young v. Robinson*, 122 Mo. App. 187 [99 S. W. Rep. 20];

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Parker v. Parker, 123 Mass. 584; *Merrill v. Emery*, 27 Mass. (10 Pick.) 507.

The conditions mentioned in the will are conditions subsequent. The law favors conditions subsequent and not conditions precedent. Page, Wills 674; 2 Jarman, Wills 6, 7; *McCall v. McCall*, 161 Pa. St. 412 [29 Atl. Rep. 63].

Conditions which tend to defeat estates are strictly construed. Page, Wills 674, and are construed as absolute rather than defeasible. 30 Am. & Eng. Enc. Law (2^d ed.) 797. A gift in clear and positive language is not cut down by doubtful language in other parts of the will. 1 Underhill, Wills 328; *Collins v. Collins*, 40 Ohio St. 353, 364; 30 Am. & Eng. Enc. Law (2^d ed.) 687; 1 Jarman, Wills 852.

Where property is distinctly severed from the estate and given to the trustee in trust for a beneficiary the title vests at once. 30 Am. & Eng. Enc. Law 790; 1 Jarman, Wills 848; *Warner v. Durant*, 76 N. Y. 133.

Where property is devised or bequeathed in trust, and the income therefrom or interest thereon is to be used for the maintenance and support of the *cestui que trust*, the title vests at once in the trustee and *cestui que trust*, and the conditions are held to be conditions subsequent. 30 Am. & Eng. Enc. Law (2^d ed.) 788; 1 Jarman, Wills 834; *Field v. Burbridge*, 19 Ky. Law Rep. 1131 [42 S. W. Rep. 912]; *Plaenker v. Smith*, 95 Md. 389 [52 Atl. Rep. 606]; *Dusenberry v. Johnson*, 59 N. J. Eq. 336 [45 Atl. Rep. 103]; *Bronson v. Bronson*, 48 How. Pr. 481; *Fox v. Hicks*, 81 Minn. 197 [83 N. W. Rep. 538; 50 L. R. A. 663]; *Fuller v. Winthrop*, 85 Mass. (3 Allen) 51.

Especially is this true where the intermediate interest is given; and the conditions are treated as conditions subsequent. 30 Am. & Eng. Enc. Law (2^d ed.) 786; 1 Jarman, Wills 834, 842, 843, 844.

Where a legacy is payable at the happening of a certain event or the time of a certain act, and the property is held in trust, the property at once vests and the conditions are conditions subsequent. 1 Underhill, Wills, 485, 508, 509, 515; 30 Am. & Eng. Enc. Law (2^d ed.) 787, 792; *Booth v. Booth*, Ves. Jr. 399; *Goodheart v. Woodhead*, 72 Law J. Ch. 281; *Smith v. Parsons*, 146 N. Y. 116 [40 N. E. Rep. 736]; *Weinstein, In re*, 43 Misc. 577 [89 N. Y. Supp. 535]; *Boraston's Case*, 1 Jarman, Wills 805; *Goebel v. Wolf*, 113 N. Y. 405 [21 N. E. Rep. 388; 10 Am. St. Rep. 479]; 1 Jarman, Wills 851; *McManany v. Sheridan*, 81 Wis. 538 [51 N. W. Rep. 1011]; *Linton v. Laycock*, 33 Ohio St. 128.

Especially is the property vested if in addition to time, the consent of others is necessary. 2 Jarman, Wills 7.

If the title vests the conditions are subsequent. Page, Wills 675; *Burnham v. Burnham*, 79 Wis. 557 [48 N. W. Rep. 661]; *Hoss v. Hoss*, 140 Ind. 551 [39 N. E. Rep. 255].

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Had John W. Long qualified as trustee the title to all of the property mentioned in the paragraph would have gone to him in trust for Parker, upon the conditions named in the will. 2 Perry, Trusts 497, 507, 508; Page, Wills 619; 1 Underhill, Wills 785; *Hadley v. Hadley*, 147 Ind. 423 [46 N. E. Rep. 823]; *Security Co. v. Snow*, 70 Conn. 288 [39 Atl. Rep. 153; 66 Am. St. Rep. 107]; *Gambell v. Trippe*, 75 Md. 252 [23 Atl. Rep. 461; 15 L. R. A. 235; 32 Am. St. Rep. 388]; *Young v. Young*, 97 N. C. 132 [2 S. E. Rep. 78].

No trustee can be appointed as his successor to carry out the terms of the trust. Page, Wills 616; *Hadley v. Hadley*, 147 Ind. 423 [46 N. E. Rep. 823]; *Security Co. v. Snow*, 70 Conn. 288 [39 Atl. Rep. 153; 66 Am. St. Rep. 107]; *Young v. Young*, 97 N. C. 132 [2 S. E. Rep. 78]; 2 Washburn, Real Prop. 321, 322, 323; Underhill, Wills 786.

This trust terminates upon the death of the trustee; or if the trustee renounces or fails to qualify this trust terminates at once. *Thomas v. Howell*, 1 Salk. 170; Page, Wills 610, 619; *Burdish v. Burdish*, 96 Va. 81 [30 S. E. Rep. 462; 70 Am. St. Rep. 825]; 2 Jarman, Wills 45, 54; *Hadley v. Hadley*, 147 Ind. 423 [46 N. E. Rep. 823]; *Security Co. v. Snow*, 70 Conn. 288 [39 Atl. Rep. 153; 66 Am. St. Rep. 107]; *Kinhead v. Maxwell*, 88 Pac. Rep. 523; *Baker v. McAden*, 118 N. C. 740 [24 S. E. Rep. 531], and the property vests; the corpus of the estate, the property, vests at once in the *cestui que trust*. Perry, Trusts 298; Page, Wills 616; *Mansfield v. Mix*, 71 Conn. 72 [40 Atl. Rep. 915]; *McIlvain's Est. In re*, 14 Lanc. Bar 44; *McIlvain's Est., In re*, 1 Del. Co. Rep. (Pa.) 248; 2 Jarman, Wills 10; *Security Co. v. Snow*, 70 Conn. 288 [39 Atl. Rep. 153; 66 Am. St. Rep. 107].

By the terms of the will the testator intended that the legal title should go to the trustee and the equitable title to Parker. Page, Wills 610.

John W. Long, having refused to qualify as trustee, the legal title which would have gone to the trustee had he qualified, descended to the heirs at law of George E. Long in trust for the purpose of carrying out the provisions of the trust, *Owens v. Cowan*, 46 Ky. (7 Mon. B.) 159; *Cushney v. Henry*, 4 Paige (N. Y.) 345; *May v. Slaughter*, 10 Ky. (3 Marsh. A. K.) 505, although some courts hold that the legal title goes to the trustee. *McWilliams v. Gough*, 93 N. W. Rep. 550.

In the will of George E. Long there is no devise over of the property if the trustee does not give the property to Parker, or to dispose of property given in trust for Parker if he fails to show habits of industry, prudence and economy. Page, Wills 680; 1 Underhill, Wills 504, 496; 2 Jarman, Wills 45.

Where the testator divides the estate between two sons, the presumption is that the heir at law is not disinherited, Page, Wills 467, and that the heirs at law will take equal share, *Kinhead v. Maxwell*,

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75 Kan. 50 [88 Pac. Rep. 523], and where property is given to a trustee in trust for one of the heirs at law and the interest or income therefrom is directed to be paid to the heir at law after a certain period of time and there is no devise over of the corpus of the estate after the death of the *cestui que trust*, the presumption is that the estate vests at once in the trustee and *cestui que trust* and that upon the death of the trustee, if the trust be one of personal discretion, the property vests at once in the *cestui que trust* and descends to his heirs at law or devisees or legatees; and if the trustee survive upon the death of the *cestui que trust* the corpus of the estate vests at once in the heirs at law or devisees and legatees of the *cestui que trust*. *Hoss v. Hoss*, 140 Ind. 551 [39 N. E. Rep. 255]; *Weakley v. Buckner*, 91 Ky. 457 [16 S. W. Rep. 130]; *Burnham v. Burnham*, 79 Wis. 557 [48 N. W. Rep. 661]; *Meek v. Briggs*, 87 Ia. 610 [54 N. W. Rep. 456; 43 Am. St. Rep. 410]; *Lippincott v. Stottsenburg*, 47 N. J. Eq. 21 [20 Atl. Rep. 360]; *Young v. Robinson*, 122 Mo. App. 187 [99 S. W. Rep. 20]; *Baker v. McAden*, 118 N. C. 740 [24 S. E. Rep. 531]; *Toner v. Collins*, 67 Iowa 369 [25 N. W. Rep. 287; 56 Am. Rep. 346]; *Fuller v. Winthrop*, 85 Mass. (3 Allen) 51.

Whatever estate Parker Long had during his lifetime, whether it be legal or equitable, at his death the legal and equitable estates combined and passed to his heir at law or devisee, Parker Long had such an estate as could be devised and such an estate which would have descended to his children or to his heirs at law. *Kelly v. Jefferis*, 2 Del. 286 [50 Atl. Rep. 215]; *Powers v. Rafferty*, 184 Mass. 85 [67 N. E. Rep. 1028]; *Chauncey v. Francis*, 181 Mass. 513 [63 N. E. Rep. 913]; *Chauncey v. Salisbury*, 181 Mass. 516 [63 N. E. Rep. 914]; *Canfield v. Canfield*, 118 Fed. 1 [55 C. C. A. 169]; *Siegwarth's Estate*, 33 Pa. Super. Ct. 627; *Burnham v. Burnham*, 79 Wis. 557 [48 N. W. Rep. 661]; *Twilley v. Toadvine*, 66 Atl. Rep. 1030 (Md.); *Ingersoll, In re*, 88 N. Y. Supp. 698; *Neely v. Phelps*, 63 Conn. 251 [29 Atl. Rep. 128]; *Hoss v. Hoss*, 140 Ind. 551 [39 N. E. Rep. 255]; *Weakley v. Buckner*, 91 Ky. 457 [16 S. W. Rep. 130]; *Lippincott v. Stottsenburg*, 47 N. J. Eq. 21 [20 Atl. Rep. 360]; *Field v. Burbridge*, 19 Ky. Law Rep. 1131 [42 S. W. Rep. 912]; *Fox v. Hicks*, 81 Minn. 197 [83 N. W. Rep. 538; 50 L. R. A. 663]; *Noble v. Birnie*, 65 Atl. Rep. 823; *Preston v. Willett*, 66 Atl. Rep. 257; *Robinson's Est. In re*, 1 Tuck. (N. Y.) 330; *Crain v. Wright*, 114 N. Y. 307 [21 N. E. Rep. 401]; *Tebow v. Dougherty*, 205 Mo. 315 [103 S. W. Rep. 985]; *Stagg v. Beekman*, 2 Edwards C. (N. Y.) 89; *Whitney v. Whitney*, 63 Hun 59 [18 N. Y. Supp. 3]; *Baker v. McAden*, 118 N. C. 740 [25 S. E. Rep. 531]; *Toner v. Collins*, 67 Iowa 369 [25 N. W. Rep. 287; 56 Am. Rep. 346]; *Warner v. Durant*, 76 N. Y. 133; *Goebel v. Wolf*, 113 N. Y. 405 [21 N. E. Rep. 388; 10

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Am. St. Rep. 464]; *Meek v. Briggs*, 87 Iowa 610 [54 N. W. Rep. 456; 43 Am. St. Rep. 410]; *Baker v. McLead*, 79 Wis. 534 [48 N. W. Rep. 657], and whatever estate Parker Long had can be devised, Page, Wills 622; *Boies' Estate*, 177 Pa. 190 [35 Atl. Rep. 724].

The question of the necessity of a gift over is discussed in Story, Eq. Jurisp. 287; Pond, Eq. Jurisp. 933; *Nunnery v. Carter*, 58 N. C. 370 [78 Am. Dec. 231, 235]; *Burdís v. Burdís*, 96 Va. 81 [70 Am. St. Rep. 825, 829].

The law favors the vesting of estates. Rood, Wills 582; Schouler, Wills 599; Perry, Trusts 508.

The \$3,000 legacy was payable to Parker at the death of the testator. Page, Wills 667.

The court's attention is called to the paragraph in which property is devised to the wife. The court will notice that in that paragraph the expression for and during her natural life is used after each piece of property, while in the paragraph devising and bequeathing to John W. Long in trust for Parker, the first devise is the brick block after the death of my wife. Here is a period, and the next sentence begins with a capital letter, as shown by the record of the will. The court which construes the will is bound by the record and cannot examine the original will. 1 Underhill, Wills 459.

If the court shall be of the opinion that the \$3,000 legacy is payable at the death of Harriet Long, the legacy vested at the date of the death of the testator, the time of payment only being postponed. Page, Wills 668; *Collier v. Grimesey*, 36 Ohio St. 17, 22; *Weymouth v. Irwin*, 7 Dec. 91 (5 N. P. 248); 1 Underhill, Wills 328; 30 Am. & Eng. Enc. Law (2 ed.) 780; 1 Jarman, Wills 834; *Pond v. Allen*, 15 R. I. 171 [2 Atl. Rep. 302]; *Linton v. Laycock*, 33 Ohio St. 128, or if the legacy is postponed for the benefit of the estate of the testator the legacy vests at the date of the death of the testator. It has been suggested that by reason of the death of Parker Long before the payment of the legacy, the legacy lapsed. The modern rule is that if the legacy vested it does not lapse, 30 Am. & Eng. Enc. Law (2 ed.) 794; *Pond v. Allen*, 15 R. I. 171 [2 Atl. Rep. 302]; *Chapman v. Chapman*, 90 Va. 409 [18 S. E. Rep. 913]; *Loder v. Hatfield*, 71 N. Y. 92; *Warner v. Durant*, 76 N. Y. 133; Underhill, Wills 783.

The \$3,000 legacy vested in Parker Long at the death of the testator. *Carper v. Crawl*, 149 Ill. 465 [36 N. E. Rep. 1040]; *Leonora v. Scott*, 10 La. Ann. 650; *Myers v. Adler*, 6 Mackey 515 [1 L. R. A. 432]; *Pond v. Allen*, 15 R. I. 171 [2 Atl. Rep. 302]; *Loder v. Hatfield*, 71 N. Y. 92; *Warner v. Durant*, 76 N. Y. 133; *Merrill v. Emery*, 27 Mass. (10 Pick.) 507; Underhill, Wills 873, and the \$3,000 legacy, together with the interest thereon is payable out of the remainder estate in the Denmark farm which was devised to John P. Long, and no part thereof

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is payable out of the life estate of Harriet H. Long in said farm. The legacy is a lien on the fee, and not a lien on the life estate ahead of the fee simple estate. Page, Wills 760; *Breck v. Parkes*, 37 S. W. Rep. 271; *Miller v. Miller*, 100 Ky. 37 [37 S. W. Rep. 271].

If the court should be of the opinion that the conditions in the will of George E. Long are such conditions as have been broken and by reason thereof the estate given to John P. Long was forfeited, Anna R. Long cannot take advantage of the forfeiture. Upon conditions broken the heir only can enter. 1 Underhill, Wills 47; 4 Kent's Commentaries, 126; 2 Jarman, Wills 5; *Manifold v. Jones*, 117 Ind. 212 [20 N. E. Rep. 124]; *Hooper v. Cummings*, 45 Me. 359; Tiedman, Real Prop. 271-277, and the right of entry is enforced by ejectment. 2 Blackstone's Commentaries 155; 1 Underhill, Wills 481; Rood, Wills 599.

Intestate property descends *per stirpes* as of the date of the death of the ancestor.

If the court should be of the opinion that George E. Long died intestate as to the remainder estate in the brick block and lot 25 and the \$3,000 legacy after the death of Harriet H. Long and the death of Parker Long, then that property descended as intestate property to the heirs at law of George E. Long as of the date of the death of the ancestor, George E. Long, and descended *per stirpes* one-half thereof to John P. Long and one-half to Parker Long; and the one-half thereof which descended to Parker Long, by his will is devised and bequeathed to his mother. Page, Wills 467; *Mathews v. Krisher*, 59 Ohio St. 562 [53 N. E. Rep. 52]; *Grinnell v. Howland*, 100 N. Y. Supp. 765; *Harmon v. Harmon*, 66 Atl. Rep. 771 (Conn.); *Smith v. Smith*, 186 Mass. 138 [71 N. E. Rep. 314]; *People's Trust Co. v. Flynn*, 89 N. Y. Supp. 706; *Grant v. Stimpson*, 79 Conn. 617 [66 Atl. Rep. 166]; *Clark v. Cammann*, 160 N. Y. 315 [54 N. E. Rep. 709]; *Jones v. Kelly*, 170 N. Y. 401 [63 N. E. Rep. 443]; *Wright v. Hicks*, 12 Ga. 155 [56 Am. Dec. 451]; *Thomas v. Thomas*, 108 Ind. 576 [9 N. E. Rep. 457]; *Phillips v. Phillips*, 93 Ky. 498 [20 S. W. Rep. 541]; *Gallagher v. Crooks*, 132 N. Y. 338 [30 N. E. Rep. 746].

In no event can John P. Long take by inheritance from Parker Long. Whatever interest Parker Long had which would descend to his heirs at law is by his will given to his mother.

Whatever interest John P. Long had in this property he took either as devisee or legatee under the will of George E. Long, or as an heir at law of George E. Long, and not otherwise. In no event can the entire interest in the brick block and lot 25 go to John P. Long. If the property is devised to Parker by the will for life, then the remainder estate descends one-half to Parker, and one-half to John, and the most that John P. Long, and Anna R. Long who is claiming as his widow,

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can receive from this property would be the undivided half of what was devised and bequeathed to Parker.

KILLITS, J.

This action was begun as a proceeding in this court to sell the lands of John P. Long, deceased, to pay debts due from his estate. It has become enlarged to include an interpretation and construction, generally, of the will of George E. Long, deceased, who was the father of John P. Long, and from whom, through the will before us, were derived the lands which the plaintiff seeks by this action to sell. A sale has been had and confirmed, and, upon distribution, it has become the duty of the court to make a partial construction of the will. All the parties interested in a complete interpretation of the instrument being necessarily before the court as parties interested in that portion involved in the distribution, they have, by cross petition and other pleadings, submitted the entire will to the court's consideration.

The enlarged duty of the court and the incidents pertaining to the distribution, give rise to several interesting questions, the solution of which is not easily arrived at.

George E. Long, the testator, died in 1898, at the age of seventy-eight years, leaving a widow, the defendant Harriet, and two children. Parker and John P., his heirs-in-law. The will in question, which was executed in 1897, and which was drawn up by the testator himself, left the homestead and all his chattels of every description, but subject to the payment of debts, to the widow absolutely. The subsequent clauses, in which are contained the provisions giving rise to doubts, are as follows:

"I also give to my beloved wife my farm in St. Joseph township during her natural life, also my interest in the brick block on the north side of the public square in Bryan, known as Long's block, during her natural life.

"I give and devise to my son, John P. Long, my farm known as the Denmark farm, he to get possession after the death of my wife, encumbered as hereafter set forth.

"I give and bequeath to my brother, John W. Long, for the use and benefit of my son, Parker, my interest in the brick block heretofore named after the death of my wife. Also lot twenty-five (25) in Edgerton's addition to the village of Bryan. Also three thousand (\$3,000) dollars in money which I hereby make a lien on the Denmark farm.

"It is my will and I direct my said trustee that at any time my son, Parker, shall give evidence that he has become economical and industrious, I direct that he convey said property to him, but in case said son does not give evidence of habits of industry, prudence and economy as would in the judgment of my said trustee justify him in

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so conveying said property to said son, I hereby authorize said trustee to hold said property and care for and rent the same and collect all rents and interest on moneys and pay all taxes and other expenses and apply the remainder or an amount necessary for the maintenance of Parker."

The concluding paragraphs nominate John W. Long executor and provide for the omission of bond and appraisement. The land devised to the widow for life and described as "My farm in St. Joseph township," is the same land subsequently referred to as "the Denmark farm."

The son, Parker, was thirty-one years old the time the will was executed, the year prior to testator's death. He was idle and somewhat dissipated in habits and lived with his parents. He died in 1902, having never married, and left a last will and testament which was admitted to probate, and in which he attempted to give to his mother, the defendant Harriet, all the interest in his father's estate set apart in the latter's will for his benefit by the provisions quoted above. There is no dispute but that Parker's instrument is sufficient to clothe his mother with whatever devisable interest he may have through the will of his father or in his father's estate. He never directly benefited from the latter, both by reason of the fact that his mother outlived him, and because his uncle, John W. Long, never exercised the discretion given him by the will and never executed the trust to convey to Parker an absolute interest in the devise and bequest for his use and benefit.

The uncle and trustee for Parker, John W. Long, never qualified as either executor or trustee and never took any steps, as we have just said, to divest himself of the responsibility upon him for the benefit to Parker. He died testate in 1905, and his widow and beneficiaries under his will are parties to this action. He was a physician in active and extensive practice, a man of fine character and judgment, and was fourteen years the junior of his brother, being sixty-two years old when the will was executed.

The testator, George E. Long, had also been a physician, but had long before his death retired from practice. He had been probate judge of the county, wherefore he was commonly called Judge Long, by which name we shall hereafter refer to him, and was a man of more than ordinary intelligence and of strong and excellent character. To him the idleness and dissipation of Parker were a source of great anxiety.

The younger son, plaintiff's decedent, was twenty-nine years old at the time the will was executed. He was then married and had entered upon the promise of a prosperous business in the retailing of drugs and other merchandise usually sold therewith. He died intestate in 1908 subsequent to the death of Doctor Long, Parker's trustee.

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He left a widow, the defendant Anna Tressler Long, but no children, the marriage having been without issue. At the time of the execution of his father's will, and, in fact, for some time after the latter's death, the habits of John P. Long were not noticeably objectionable, but thereafter they became such as to involve him in serious financial difficulties out of which came incumbrances in large amounts upon all his property, both in hand and in expectancy, necessitating a sale of his remainder in the Denmark farm, in order to administer upon his estate. This land was sold for \$16,535 subject to Harriet's life estate, and free of the dower of Anna, who was thirty-five years old at the time and who elected to take her dower in money.

Lot 25 of Edgerton's addition to the village of Bryan, was never owned by Judge Long, but at the time his will was executed and at his death he owned lot 22 of Bostator's addition to the village, which lot fronted on Edgerton street. The two lots are at least a quarter of a mile apart. The additions are not contiguous.

At the time the will was executed, in 1897, the Denmark farm diminished by an incumbrance of \$3,000, was approximately equal in value to the interest of Judge Long in Long's block with the lot in Bostator's addition plus \$3,000, wherefore the provisions of the will for the two sons were about equal, leaving out of consideration the restriction upon Parker's absolute control of his interest.

Upon these as the principal facts all the questions before the court touching the interpretation of Judge Long's will are founded, although other facts of less relevancy may occur for reference in the following discussion. It is plain that the court has before it no easy task. The combinations possible upon the varying elements of human feelings and interests being practically infinite, it follows that substantially every last will and testament sufficiently ambiguous to require construction is *sui generis*, wherefore close precedents are hard to find; but consideration of the similarity of the operations of affection and of reasonable conduct under all circumstances has brought about certain rules of construction which are supposed to ensure the result which the average reasonably minded testator must have had in mind.

The controversies are principally between the two widows. Harriet claims that the third and fourth paragraphs, quoted above, from the will, are sufficient to have vested in her son, Parker, a devisable estate in fee in the several descriptions of real estate, and a present right to the legacy of \$3,000 charged upon the Denmark farm, which he might bequeath, all of which property passed to her by will, wherefore she is now the owner in fee of the interest in Long's block and has the right to have distributed to her, first after the charges of sale, \$3,000 of the proceeds of the sale of her son John's remainder in that farm. She also claims that the court has the right to find that

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her husband intended to convey the lot 22 in Bostator's addition by the erroneous description of lot 25 in Edgerton's addition, and that her title to the lot in Bostator's addition should be quieted to her in fee.

In behalf of Anna it is insisted that, having died before his mother, and not having been clothed with an unrestricted title by reason of the fact that Dr. Long never attempted to determine the conditions laid down in the will upon which an unrestricted estate should go to him, Parker never obtained an interest in his father's will which he, in turn, could devise and bequeath to another, wherefore the \$3,000 legacy, the vesting of which she claims was postponed until after Harriet's death, lapsed, enabling her husband, John, to take the remainder in the Denmark farm free of that lien; that the interest in the brick block and the town lot became intestate property of Judge Long's estate which her husband inherited upon the theory that nothing had vested in Parker except a life estate upon his mother's life estate. And she asks that she may have her dower in the Denmark farm protected against the alleged lien by way of the disputed legacy, and that, under Sec. 4158 Rev. Stat., she may be found to be vested with a life interest in the brick block and the town lot, with remainder to the heirs of her husband who are of the blood of his father, and who are parties to this action, being a brother and sister of Judge Long and children of two deceased brothers. The latter have filed no pleadings of any kind.

It is seen that the court has a triple duty to perform, in that no two of the three provisions for Parker, contained in the third paragraph quoted above from the will may be considered together; the interest in the brick block, the town lot, and the legacy, each requiring in part different treatment.

The paramount duty is to first ascertain the testator's intention and then to order it into effect. To that end all rules of construction are to be followed only as they are seen to be aids to a determination of that intention, and no rule, however sanctioned by usage, may be applied to a thwarting of testator's plain intention; *Baldwin v. Humphrey*, 2 Circ. Dec. 417 (4 Re. 57). We must find the intention in the instrument itself, and all parts of the instrument may be, and should be, if necessary, considered together as speaking the testator's wish in each part; *Townsend v. Townsend*, 25 Ohio St. 477. We can refer to extrinsic circumstances touching any subject in the will and read the instrument in the light thus gained, if any; *Thompson v. Thompson*, 4 Ohio St. 333. We may presume that, when it appears that testator's mind was directed to any particular portion of his property, it was not his intention to die intestate in any degree as to that portion. and we should put such a reasonable construction upon his equivocal

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words or expressions as will prevent such a result; *Collier v. Collier*, 3 Ohio St. 369. In cases of doubtful construction we may presume that testator intended to treat all members of a class with equality; 30 Am. & Eng. Enc. Law (2 ed.) 669. Where it is proper to indulge the presumption of equality of participation in testator's bounty a construction should if possible be avoided which will cause the provision for one to fail to the consequent enlargement of the shares of others of the same class; *Benedict v. Web*, 98 N. Y. 460.

Added to these and other guides to construction which may be hereafter noted in passing, is our statute, Sec. 5970 Rev. Stat., which reads:

"Every devise of lands, tenements or hereditaments, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate."

This statute is by its terms a rule of construction only, not of property, to be employed when it aids in the ascertainment of intention, and to be disregarded when its observance is plainly subversive thereof. It proceeds upon the theory that the testator is presumed to have intended to complete the testamentary undertaking upon which he entered, and when that presumption is plainly inapplicable to the particular provision under consideration, the statute has no application. otherwise the statute controls.

In this case counsel have filed painstaking, exhaustive and able briefs in attempts made on both sides to illuminate every point which the court might deem important. We cannot, however, undertake to discuss all the subjects covered by the briefs and arguments, but must, perforce, confine this opinion to those authorities and arguments, only, which impel us to the conclusions found herein, and we will take up the three questions of construction in order of their difficulty, beginning with the least difficult, that dealing with the town lot.

As to that we are of the opinion that we cannot correct this description and that, as to lot 22 in Bostator's addition, Judge Long died intestate. The rule upon the subject of erroneous descriptions is well stated in the case of *Christy v. Badger*, 72 Iowa 581 [34 N. W. Rep. 427], in which the devise was of a "small farm in Wayne county, near the Missouri line." The testator owned no farm in Wayne county but did own one in Lucas county, which was not referred to in his will. In Wayne county he owned a woodlot of ten acres which he had purchased in connection with the Lucas county farm, six miles distant. The court held that the description could not be corrected to pass the tract in Lucas, and, in its opinion, laid down this rule, which has since been generally quoted and followed with approval:

"If, after the false description is discarded, there remains in the

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devise language sufficient to direct to the identification of the subject with sufficient certainty, an estate will pass thereby. But when the false language is eliminated, and nothing remains directing inquiry which may result in discovering the true subject of the devise, it is void."

This rule, is, in fact, the one followed by our own courts in several cases in which the maxim of *falsa demonstratio non nocet* was applied. *Ashworth v. Carleton*, 12 Ohio St. 381; *Banning v. Banning*, 12 Ohio St. 437; *Merrick v. Merrick*, 37 Ohio St. 126 [41 Am. Rep. 493]. In each of these cases, the court, reading the whole will, is able to discard the false description and find enough left to apply to the correct description of the property which the testator actually owned and which it is presumed he intended to devise. It is conceded that the slightest means of identification may be seized upon to avoid intestacy after discarding the erroneous description, as in *Merrick v. Merrick*, *supra*. A leading case on this phase of the subject is *Eckford v. Eckford*, 153 N. W. Rep. 345 (Iowa), reversed on rehearing, *Eckford v. Eckford*, 91 Iowa 54 [58 N. W. Rep. 1093; 26 L. R. A. 370], wherein the court, on rehearing, found that a claim of ownership recited in the will was sufficient to avoid the effect of the decisions which prevented a correction in a case like this at bar. Here dropping out the words of description which locate the lot in Edgerton's addition and giving the number, 25, there is nothing left in the will upon which identification of the lot actually owned may hinge. Unlike the case of *Ashworth v. Carleton*, *supra*, where there was a correct designation of the fraction (twelve) but an incorrect numbering of the township, there is here both a wrong number (twenty-five instead of twenty-two) and a wrong addition. Had the devise described the lot as number 22 in Edgerton's addition, we might have dropped out the name of the addition, and applied it to lot 22 in an addition of another name but on Edgerton street; nor is there here the little that there was to help the devisee out in *Merrick v. Merrick*, *supra*, the fact that a life estate had been given the widow, for as to whatever town lot Judge Long intended to devise by this description, it is indisputable that he never attempted to give to his widow a life interest in it.

An examination of every case in which a devisee has been relieved against an erroneous description, at least so far as we have been able to examine the authorities, will show that the instrument contained some shred of thought, after rejecting the words which were inapplicable to the property, from which, aided by extrinsic facts, might be gained a reference to the right premises; but, unless there is something in the will which points to the premises actually owned by testator and which, it is claimed, he intended to describe in the disputed devise, something which may serve as a foundation for testimony helping out the applica-

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tion, such testimony cannot be received. The distinction is better stated in the opinion in *Fitzpatrick v. Fitzpatrick*, 36 Iowa 674 [14 Am. Rep. 538, 546] :

“In all the cases coming within the scope of our investigation of this question, where extrinsic evidence has been admitted to remove a latent ambiguity, the language of the will, after rejecting the false description, has been sufficient to show what property or what person was intended by the testator. * * * If there is no person or no property corresponding to the description in all particulars, but there is one corresponding in many particulars, and no other that can be intended, the false description will be rejected, and the property corresponding to the description in other particulars is held to pass, or the person thus answering the description will take under the will. But we have seen no case where other words than the words of the devise have been allowed to be imported into the will in order to describe a devisee, or to identify property to which the words of description in the will did not apply, upon the principle above cited. And when, by rejecting the false description, the remaining words do not describe the property or person to any extent, parol proof to show the testator's intention is inadmissible.”

It is manifest in Judge Long's will, that there is nothing in the terms of this devise, or elsewhere, remotely descriptive of, or in reference to, lot 22 in Bostator's addition or any other town lot except his homestead and the lot in Edgerton's addition, and it would seem that in this respect this case is not only clearly distinguishable from the cases in Ohio to which we have referred above, but that to permit the devise to apply to the lot not described would be to subvert all the principles which require wills to be in writing, and to reject all authority.

The authorities on the subject are exhaustively reviewed by Judge Kinne, of the supreme court of Iowa, in his dissenting opinion of *Eckford v. Eckford*, *supra*, his dissent being only upon the sufficiency of the words left in the will, after rejecting the misdescription, to identify the property. Other authorities examined by us are: *Sturgis v. Work*, 122 Ind. 134 [22 N. E. Rep. 996; 17 Am. St. Rep. 349]; *Bingel v. Volz*, 142 Ill. 214 [31 N. E. Rep. 13; 16 L. R. A. 321; 34 Am. St. Rep. 64]; *Sherwood v. Sherwood*, 45 Wis. 357 [30 Am. Rep. 757]; *Kurtz v. Hibner*, 55 Ill. 514 [8 Am. Rep. 665].

We conclude therefore that we cannot apply the devise to a conveyance of the lot in Bostator's addition, and that, as to that tract, Judge Long died intestate, the title descending according to the statute and the will of Parker Long, which would clothe the widow, Harriet, with an estate in fee in the undivided one-half, and dower in the remaining moiety, in which Anna Long, by virtue of Sec. 4158, would

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have a life estate subject to her mother-in-law's dower, with remainder in fee to the heirs of John P. Long of the blood of his father, who are the defendants Laura L. Riggs, William H. Long, James W. Long, subject to his mother's dower in his share, and Emma L. Taylor. Of course, if the proceeds of the sale of the Denmark farm are insufficient to meet the demands of administration upon the estate of John P. Long, which seems probable, the undivided half of this lot inherited as intestate property by John P. Long would be subject to sale to pay his debts, in which case, his widow would have dower, only, subject to Harriet's dower therein, and the remote heirs would take nothing, as there would doubtless be no surplus to be distributed as representing their minute interests.

Considering, next, the \$3,000 legacy, which was made a lien upon the land sold, it is manifest, that the initial difficulty is to determine whether or not it vested for Parker's benefit at the death of the testator. Before attempting a solution of this question, it is profitable to review the elements entering into it. First, it seems to be the only conclusion that Judge Long did not intend this to be a charge on both Harriet's life estate and John's remainder, but rather upon the latter alone. Although the words of this bequest, "I give and bequeath," followed by the words, "which I hereby make a lien on the Denmark farm," are in the present tense, we cannot believe that the testator meant that it should be applied to present interests in those premises. Mrs. Long's devise of a life estate in the previous paragraph is without qualification or diminution. While it is undoubtedly the rule that an unqualified devise in an early provision may be cut down by subsequent language, *Baxter v. Bowyer*, 19 Ohio St. 490, this same authority demands that we should use all reasonable means to reconcile apparently conflicting provisions, to give them both the effect in full which, after a consideration of all the will, enlightened by extrinsic facts, it is judged the testator reasonably intended. To effect this result our court has adopted Jarman's rule 12, which reads in part as follows:

"That an express and positive devise cannot be controlled by the reason assigned, or by any subsequent ambiguous words, or by inference and argument from other parts of the will." *Parker v. Parker*, 18 Ohio St. 95, 105.

Second, the most reasonable interpretation seems to be that the time of payment was intended to be postponed until the termination of the life estate in Harriet. It is incredible to assume that Judge Long intended this legacy to take the course of legacies generally, to be due and payable one year after his death, and to draw interest thereon until paid, and to be charged, with its accruals of interest, against John's remainder during the uncertain period of his mother's

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life; it is unbelievable that he intended thus to burden John during a time when the latter was unable to draw any usufruct whatever from the provisions for him. It seems to have been the testator's clear intention that neither of his sons should have any direct benefit from this will during the mother's lifetime, except, perhaps, as to the erroneously described town lot, in which he omitted to create a life estate. Third, the foregoing arguments lead us to the next element, namely, that the postponement of payment is not from any consideration personal to Parker or his trustee, but was for the convenience of John and the estate generally. The time of payment, assuming that it is postponed, does not enter into the substance of the gift, as in all the cases in which it is held that vesting also is postponed, but the gift is distinct from the time of payment. If these were all the elements of this situation, we would have no trouble in reaching the conclusion that this legacy vested at Judge Long's death and did not lapse at Parker's death. *Linton v. Laycock*, 33 Ohio St. 128, 135; *Collier v. Grimsey*, 36 Ohio St. 17; *Bolton v. Bank*, 50 Ohio St. 290 [33 N. E. Rep. 1115]; *Thompson v. O'Dell*, 12 Circ. Dec. 396 (22 R. 200); *Weymouth v. Irwin*, 7 Dec. 92 (5 N. P. 248); *Bushnell v. Carpenter*, 92 N. Y. 270; *Loder v. Hatfield*, 71 N. Y. 92; 30 Am. & Eng. Enc. Law (2 ed.) 767, 781.

In behalf of Anna Tressler Long it is contended that because Parker died before time of payment of this legacy, the lien upon her husband's remainder in the Denmark farm failed, and John took his devise exonerated from the encumbrance, and, among other authorities, 30 Am. & Eng. Enc. Law (2 ed.) 793 and 794, is cited, but the same authority, on the last page cited, states that the rule claimed by her counsel has been modified to exclude just such legacies as we have found this to be. The text in that behalf, sustained by numerous authorities, is:

This rule, however, has been modified, and a legacy charged upon the land shall be deemed vested * * * where payment of the legacy is not postponed from any consideration personal to the legatee, but for the convenience of the estate. In such a case the legacy will vest even though the legatee dies before the time fixed for payment. 30 Am. & Eng. Enc. Law (2 ed.) 794.

Our difficulties respecting this particular provision are not over, however, for it has so far been treated as if it had been a bequest directly to Parker instead of in trust for Parker. How far this additional element will operate to change the nature of the estate from a vested one to a contingent is a matter of doubt, to dissolve which we are not able to refer to any specific authority, although the cases hereinafter considered are almost in point to hold that this feature does not make any difference. The law, however, favors vested rather than

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contingent interests (30 Am. & Eng. Enc. Law (2 ed.) 765) and it is undoubtedly the duty of the court to construe a bequest as vested when in doubt. *Bolton v. Bank*, 50 Ohio St. 290, 293 [33 N. E. Rep. 1115].

The opinion in this case seems to settle this point, as applied to the feature of this legacy now under consideration, and likewise seems to take out of controversy the difference that Parker's bequest was equitable, only. The court says, pages 293 and 294:

"It is the settled rule of this court to construe all devises and bequests as vesting in the devisee or legatee at the death of the testator, unless the intention of the testator to postpone the vesting to some future time is clearly indicated in the will. * * *

"The only distinction between this case and the previous one is, * * * that the estates of the devisees are equitable and not legal. But this does not affect the question, for it is well settled that equitable estates vest and descend as legal estates."

With this we still, however, have to reckon with that provision of the will which restricts Parker's interest to the "use and benefit," with no absolute control until after the condition is met upon which Dr. Long may act to divest himself of this trust.

This situation gives rise to the query whether a proper construction of the will is that Parker was to get a beneficial estate for life, only, to be enlarged to an absolute estate upon the happening of a condition precedent, or whether it should be that Parker was given an absolute equitable estate which he might extend to a legal title by meeting a condition, which is a condition precedent, only, to such extension. This question is equally applicable to the brick block. In Ohio, "the same construction is followed in gifts of personalty as in devises of realty," *Thompson v. O'Dell*, 12 Circ. Dec. 396, 399 (22 R. 200); wherefore we may henceforth consider the two provisions together.

We are now facing the real problem of Judge Long's will: Did Parker have something resulting from the will and touching the \$3,000 legacy and the brick block, which he could in turn pass by will; something which his heirs would inherit had he died intestate? If his will, respecting these properties, avails nothing, then it is manifest that Judge Long died intestate to the extent of the principal of the legacy and the remainder in the brick block after the death of Parker. In such a case, Anna Long, as the widow of her childless husband, would not have an estate for life in the business house, and the whole principal of the legacy, as her counsel contends, but her interest would be in a moiety, only, of these properties, for Parker would inherit equally with John in this partial intestacy, and Parker's share would pass under his will to his mother. The inheritance in which her husband, John, became interested, assuming the partial intestacy, relates back to the death of Judge Long, and was not postponed until after the death

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of Parker. In other words, if the will is insufficient to pass the whole interest to Parker, subject only to a restriction upon his control, but does no more than to pass a life estate with a possibility of enlargement to an absolute ownership, which possibility ceased at Parker's death, it seems certain that the suspended interest was, from the death of Judge Long, a contingency which might be held as an estate of inheritance and consequently be devisable. *Kenyon v. See*, 94 N. Y. 563.

The claim of Anna Tressler Long, to be allowed, involves a construction bringing about a partial intestacy, a result which should be avoided, if possible, according to the rule which we have already alluded to (*Collier v. Collier*, 3 Ohio St. 369) and which finds expression also in the statute which we have quoted. Courts have seen proper to go far in construing a will to avoid partial intestacy, and one of the means employed is the application of the doctrine that the general intent of the testator controls a particular direction, when they are in conflict. Page, Wills Sec. 463, expresses the rule in this form:

"This conflict of intention usually arises where the testator has not carefully thought out the application of the provisions of his will to all possible states of fact, and has not, therefore, foreseen the actual contingency which has caused the inconsistency. In such a case, the court, while avoiding making a will for a man who did not succeed in making one for himself, will, nevertheless, if the general intention of the testator is clear, give effect to such intention, disregarding the particular intent of the particular clause."

This seems to be almost too strong for it leaves to the court extraordinary latitude in comparing and weighing the evidences of general and particular intent existing in the language of the will, but, at least, a safe rule is, that the general intent of testator, plainly derived from the will and the circumstances under which it was executed, if it appears to be to make a complete disposition of the estate, while it may not control a particular direction, may yet be of very great weight in determining the nature of a particular devise. *Given v. Hilton*, 95 U. S. 591, 594 [24 Law Ed. 458].

In *Boston Safe Deposit Co. v. Coffin*, 152 Mass. 95 [25 N. E. Rep. 30; 8 L. R. A. 740, 747, 748], Judge Devens says:

"When an intention to dispose of the whole of an estate appears, a partial intestacy should not be recognized unless the deficiencies in the expressions of the will are such as to compel it. * * *

"When a reading of a whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court will supply the defect by implication and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole sufficiently declared."

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And in *Balch v. Pickering*, 154 Mass. 363 [28 N. E. Rep. 293; 14 L. R. A. 125], the court held that the literal meaning of the words of a will should not prevail where it would not only bring about a partial intestacy but disturb the testator's manifest intention to deal equally by his beneficiaries, but that the will should be construed to preserve the general intent.

An early and abiding feeling arises from a consideration of the terms of this will, had in connection with the evidence respecting the parties and their mutual relations and the character and value of the property divided, at the time the will was made, that Judge Long intended that his two sons should share as equally as possible in his bounty after their mother's estate should have terminated, and a significant feature of the will itself is the two-fold nature of the trust he reposed in Dr. Long for Parker. Dr. Long is a trustee in two capacities, first, to manage the property pending the exercise of the second trust, and, second, to clothe his *cestui que trust* with the absolute title in his discretion. We are satisfied that the conditions of the second trust are not void as being unreasonable and uncertain, and that they are, in fact, conditions precedent. It is clear that the testator did not intend that an unrestricted estate should be put in Parker's hands until the favor was earned. But, reaching this conclusion, are we compelled to say that nevertheless Parker could not pass the principal of the legacy and the fee in the building by will? It must be conceded that this second trust is wholly personal to Dr. Long and that it could not be executed by any one else, that testator did not intend it to be executed by any one else. Such a personal trust dies with the trustee, and the first trust passes into the estate of decedent until the selection of a successor to hold the legal title during Parker's life. Says the court in *Gambel v. Trippe*, 75 Md. 252 [23 Atl. Rep. 461; 15 L. R. A. 235, 236; 32 Am. St. Rep. 388]: "Whenever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given," and in *Baker v. McAden*, 118 N. C. 740 [24 S. E. Rep. 531], it is said that such a trust is not succeedable for the reason that a court "could not appoint a successor trustee because it could not invest him with the confidence of the testator." *Hinckley v. Hinckley*, 79 Me. 320 [9 Atl. Rep. 897]; *Security Co. v. Snow*, 70 Conn. 288 [39 Atl. Rep. 153; 66 Am. St. Rep. 107]; Page, Wills Sec. 619.

We are not willing to say that the death of Dr. Long before the execution of this personal trust would have had the effect to clothe Parker with complete dominion over the provision in his behalf. Such a result would certainly violate testator's intention.

To the court's mind some importance should be attached to the

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fact that Judge Long left to one person only the power to clothe the son with an unrestricted ownership of the devise and legacy for him. We should not forget that the testator was a man of more than average ability and intelligence, who, as judge of probate, must have acquired some familiarity with testamentary matters, out of which familiarity he essayed to write his own will; that he was plainly attempting to treat his sons equally in the usufruct, at least, of his estate, distinguishing between them only as he was forced to do because of the habits of the elder; that this elder son was still a young man, with possibilities of marriage and paternity still features of his future; that the testator saw fit to omit a time limit to the execution of this trust while yet he deemed it prudent to cast it upon an old man with whom it might die long before Parker's opportunities to fairly earn its benefits might be foreseen to be lost; and, finally, but not least in importance, that testator omitted to make any provision for the devolution of this property, either directly or in a residuary clause, in case this personal trust should fail.

In the provisions under consideration, as we shall see hereafter, the testator uses language sufficient to convey a fee and an absolute interest in the principal of the legacy, and he uses such language consciously for he empowers his brother to convey a complete title. In his language there is a pathetic suggestion and hope, reading between the lines, that his erring son might be encouraged to a better mode of living, and then become entitled to complete control of his estate, such as the brother was to enjoy. Is it conceivable that this testator, considering the care he took in hedging Parker's interest about that it might not be frittered away in idleness and dissipation, and considering also his intelligence and manifest desire to be just, should have overlooked the possibility of Parker's failing to earn his uncle's good-will before the latter's death? And, conceding that Judge Long must have had in mind this disagreeable alternative, is it conceivable that he would have omitted a provision for the remainder upon Parker's failure to earn the fee, had he not intended that all the interest of his estate in both building and legacy should pass to Parker and Parker's estate, by the language already employed? Would not a man of his intelligence have looked out for and provided for possible heirs of Parker's body, under such circumstances, if he did not intend the language to be sufficient?

That the great question now in hand is not free from difficulty is shown by the fact that the authorities are not harmonious. While they are reasonably numerous on both sides, by far the greater weight leans to that which upholds Parker's right to dispose of both principal of the legacy and the fee by will, upon the theory that the legal estate was vested in his trustee and the equitable estate in fee in him, and

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that at his death the two estates coalesced to be enjoyed by his heirs or his legatees and devisees, according whether he died testate or intestate. Counsel for Anna Long insist that the condition that Parker shall show habits of industry and prudence and economy is a condition precedent, which failing, the estate fails. We have already agreed with them that this is a condition precedent, but that does not solve the difficulty, for the condition may be referred to a parting of the legal and equitable estates as well as to stand to prevent a life use from enlarging into an absolute estate. Equitable estates, whose owners may transmit by inheritance or devise an absolute legal estate, are quite commonly recognized, as will appear from authorities which we will hereafter cite.

Aside from cases and texts which counsel use to make their claim that the condition is one generally precedent, we are referred to but four cases, *Markham v. Hufford*, 123 Mich. 505 [82 N. W. Rep. 222; 48 L. R. A. 580; 81 Am. St. Rep. 222]; *Donohue v. McNichol*, 61 Pa. St. 73; *Webster v. Morris*, 66 Wis. 366 [28 N. W. Rep. 353; 57 Am. Rep. 278]; and *Cassem v. Kennedy*, 147 Ill. 660 [35 N. E. Rep. 738], supporting their contention that its performance precedes an absolute estate. We have found, in our own library and in the county law library, three other cases, *Paulson v. Paulson*, 127 Wis. 612 [107 N. W. Rep. 484; 5 L. R. A. (N. S.) 804]; *Stark v. Conde*, 100 Wis. 633 [76 N. W. Rep. 600]; *Jarboe v. Hey*, 122 Mo. 341 [26 S. W. Rep. 968]. Possibly there are other cases which support Anna Long's claims, but we have not been cited to them by her counsel. Each of these cases is weakened as authority by conditions in their facts which well distinguish them from the case at bar. In *Markham v. Hufford*, the provision of the will was for a legacy of \$500 to be paid at the end of two years after death of testator provided the legatee should be then deemed to be a reformed man. It was held that reformation within the time was a condition precedent, and that the legatee got no vested interest in the legacy. The will had a residuary clause as well as an imperfectly worded provision for the devolution of this sum in case it did not vest in the legatee.

In *Webster v. Morris*, *supra*, the conditional beneficiary was yet an infant when the suit was brought and decided. He was the grandson and sole heir at law of testator, and was a beneficiary under an item which provided that \$10,000 should be invested and sufficient of the proceeds used for his education until maturity, at which time he was to be paid the unexpended income. Thereafter, until he was thirty years old, he was to be paid the net income of the fund, when he was to have half of the principal and the balance in yearly installments of \$1,000 provided that, in the estimation of the executors and

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before payments were to be made out of the principal, the beneficiary should have acquired a useful vocation and should exhibit a good moral character. There was a special provision that if he died "without leaving an heir" and before the legacy was paid him, it was to go to charity and there was also a general residuary clause. The action was to construe the will and in behalf of the boy it was claimed to be ambiguous and void for uncertainty, and the decision goes no farther than to uphold the provisions as reasonable and certain. Had there been no gift over and no residuary clause, there is nothing in the decision inconsistent with the proposition that had the beneficiary died before the maturing of the ultimate condition, his heirs or legatees might obtain the corpus of the gift.

In *Stark v. Conde*, *supra*, the provision was for a legacy to be paid to the beneficiary when he arrived at the age of thirty years, if at that time the executor was of the opinion that it might be safely entrusted to him, and if the decision was against the legatee, the bequest was to go to other parties. In *Paulson v. Paulson*, *supra*, \$1,500 were bequeathed to a son to be paid in fifteen annual installments, provided he attended a certain church with regularity, otherwise the fund was to go to charities. In *Cassem v. Kennedy*, *supra*, a house and lot was devised with the provision that the devisee should not enjoy the benefit of the devise until he settled down and got married, or until he became forty years old, in either of which events, if he satisfied the county judge that he had acquired regular habits or had gotten married or had reached the age, he was to take his title. There was a provision that if, in the meantime, he became injured, he was to have the rents and profits only. A few months after testator's death devisee attempted to sell the property, and it was held that these were conditions precedent because of which no title could pass until one of them was met. The report is silent as to other provisions of the will, if any. In *Donohue v. McNichol*, *supra*, all the real and personal property was given to a trustee, executor of the will, and out of the income enough was to be used to support a son respectably, provided that if the son became sober, he was to enjoy the entire income. The son died without reforming, and it was held that he had taken no title to the real estate, but only a conditional life estate in the profits which also failed because the condition was not performed. The will contained a devise over. In *Jarboe v. Hey*, *supra*, one-third of testator's real estate was devised to a son in trust for another son, Charles, upon these conditions: The trustee was to manage the property and out of the profits provide Charles with two suits of clothing yearly, and use \$25 per month for the maintenance of Charles; provided that whenever the trustee deemed that Charles had reformed, and had become capable of using money for proper purposes, \$1,000 of the accruals of

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rents and profits might be given him, and it was directed that, after the expiration of one year from the latter event, if the trustee had become convinced that Charles had become of prudent and careful habits, he might turn over to him the real estate and moneys of the trust absolutely, but if the time never arrived when the trustee deemed it prudent to carry out the trust, then the property should remain in the hands of the trustee under the conditions named and, at the death of Charles, it should go to his heirs. The will also provided for a succession to the trust in case the appointee died before Charles.

Distinct and vital differences appear between the terms of Judge Long's will and the instruments in the several cases just considered. First, in each of these seven cases the will makes provision for the devolution of the property given in trust in case the conditions should fail, either by a general residuary clause or by a special gift over, and in some cases both provisions appear; that is, there was, in any of these estates, no possibility of whole or partial intestacy, no contingent intestacy possible to result from the failure of the conditional beneficiary to earn an absolute title. Second, in neither of the seven wills, except in *Webster v. Morris*, *supra*, was there provided a complete enjoyment of the "use and benefit" of the trust property to the *cestui que trust*, during the probationary period. In *Markham v. Hufford*, *Paulson v. Paulson*, *Stark v. Conde* and *Cassem v. Kennedy*, the beneficiary was to derive no benefit whatever from the provision for him until the conditions were met, except that Cassem, if he became injured, was to enjoy an income, while in *Donohue v. McNichol*, and *Jarboe v. Hey*, he was to have but a partial interest in the net rents and profits. Third, in the Markham, Stark, Paulson and Webster cases, each testator fixes an exact time limit at or before which the beneficiary must meet the conditions or lose his conditional gift, which was then to go over. In addition to other matters, the Cassem case is peculiarly different from the case at bar in that there the beneficiary was to get his gift without conditions if he lived to be forty years old. Considering the radical differences between these other wills and Judge Long's testament, these cases are seen to have much less value as authority than but a superficial reading would suggest.

On the other hand, the diligence of counsel for Harriet Long has brought to our attention a large number of cases from many jurisdictions whose courts have good standing, all of which support the result at which we arrive in this case, both as to the bequest of \$3,000 and the devise. In this already too long an opinion we can discuss only those most nearly in point. In *Appeal of Mills*, *Boies' Est. In re*, 177 Pa. St. 190 [35 Atl. Rep. 724], from a court which decided *Donohue v. McNichol*, *supra*, testator devised and bequeathed certain property in trust for his son M, providing that the entire net income should be

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paid M during his life, in quarterly installments, and the trustee was given the power, if at any time, in his judgment, M reformed and ceased to use intoxicating drinks, to pay him from \$3,000 to \$5,000 to enable him to engage in business. A codicil made it clear that testator meant that his other children should have estates in fee in their shares but did not clear up the problem as to M who died without children, but leaving a will. The will was upheld on the precise grounds maintained in this case, that testator, using the words of the opinion, "created an active trust for Matthew's protection and benefit, limited in duration to his natural life, without making any further disposition whatever of the corpus, or otherwise restricting Matthew's authority to dispose of it as he did," and this action was taken not only to save the estate from partial intestacy, but to preserve the equality between the beneficiaries, which the court deemed to have been the testator's intention.

In *Weakley v. Buckner*, 91 Ky. 457 [16 S. W. Rep. 130], \$2,900 were bequeathed to a trustee who was to pay the income to the wife of a son for the family support, but neither principal nor income should be reached by the son's debts. If the son should live for five years a sober and temperate life, then the principal should be paid to him as his own property, provided he then had no debts which could reach it. The son never reformed, and died intestate. It was held that the principal passed out of the trustee's hands into the son's estate to be administered upon and to be distributed under the statutes of distribution. In *Meek v. Briggs*, 87 Iowa 610 [54 N. W. Rep. 456; 43 Am. St. Rep. 410], the testator devised certain property in trust for A to be managed by the trustees and the income applied to her support until such time as A should prove competent to manage it, when the title should vest absolutely in her. It was held that the title in fee vested in the trustees for A and that if A died before the property was transferred to her, the equitable and legal titles would then merge and pass to her heirs. The testator had made no provision for the devise should the property not be transferred to A in her lifetime. This case is very interesting in its almost complete parallel to the one at bar, and it, added to the two last considered, afford full authority for the position taken by counsel for Harriet Long. In *Lippincott v. Stottsenburg*, 47 N. J. Eq. 21 [20 Atl. Rep. 360], the court is called upon to construe two wills, with almost identical provisions, wherein the parents of William Pancoast each provide a legacy for him to be held by trustees who are to pay the income therefrom to William until such time as they deem it prudent to pay him the principal. The residue of the two estates was devised to the other children of the couple absolutely. William died before he obtained the principal of his legacy, leaving a will of the same to his wife. The will was upheld and his

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widow received the share, the court laying stress, as in the other cases cited above, upon the fact that neither testator had made provision for the event that the principal might never be paid William.

In *Baken v. McAden*, *supra*, testator's daughters were made beneficiaries of a trust in their several favors, the trustee to distribute the income of the trust property from time to time among the beneficiaries as he thinks best, and to give the principal of her share to any daughter at such time as he thinks best. One daughter died before receiving the principal of her share, which she attempted to pass to her husband by will. The holding was that the trust was for an absolute title, and that it terminated at the death of the daughter, when the equitable and legal titles merged in her devisee.

In *Toner v. Collins*, 67 Iowa 369 [25 N. W. Rep. 287; 56 Am. Rep. 346], the estate was devised in trust for three daughters to be held by the trustee until the daughters should respectively marry to the trustee's approval, when he should clothe the marrying child with an absolute power of her share. There was no devise and bequest over, and one daughter died young and without having married. Her right to dispose of her share was upheld, the court holding that marriage was not a condition precedent to the vesting of title, and that the separation of the legal and equitable estates necessarily ceased at her death.

In *Canfield v. Canfield*, 118 Fed. Rep. 1 [55 C. C. A. 169], opinion by Judge Day, the testator, after making minor bequests, devised the main portion of his property to his uncle, "in trust for the use and benefit of my brother." The trustee was to manage the property, and use so much of the net income as he deemed necessary for the education and support of the brother until the latter came of age, when, if the uncle deemed such a course prudent, the brother should enter into the unrestricted enjoyment of the property, but, if the uncle did not then judge it best to pay over the property to the brother, it should be held by the trustee indefinitely until such time as he should "deem it prudent and proper to put the same under the management and control of my said brother." No provision was made for the contingency that the brother might not get the principal. It was held that it was clearly the intention of the testator to vest the estate in the brother subject to the right of the trustee to exercise the discretion given him, and that on the death of the beneficiary the property did not revert to the testator's estate, but vested in the brother's heirs. We ought not to burden this opinion with extracts from Judge Day's reasoning, but the curious are referred to the report of the case for the same; nor will we further enlarge this decision with the consideration of additional cases. Among many others cited by counsel for Harriet Long, the following we deem most applicable: *Kelly v. Jefferis*, 3 Del.

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286. [50 Atl. Rep. 215]; *Chauncey v. Francis*, 181 Mass. 513 [63 N. E. Rep. 913]; *Powers v. Rafferty*, 184 Mass. 85 [67 N. E. Rep. 1028]; *Kinhead v. Maxwell*, 75 Kan. 50 [88 Pac. Rep. 523]; *Noble v. Birnie*, 105 Md. 73 [65 Atl. Rep. 823]; *Twilley v. Toadvine*, 66 Atl. Rep. 1030 (Md).

If there is any doubt of the sufficiency of the language of this provision for Parker to convey the corpus of Parker's share as well as the use to the trustee, Dr. Long, attention is invited to these cases in our own jurisdiction, as well as to the discussions in the cases referred to in the foregoing, and many other authorities which can be easily found: *Collier v. Collier*, 3 Ohio St. 369, 374; *Davis v. Boggs*, 20 Ohio St. 550; *Isherwood v. Isherwood*, 8 Circ. Dec. 409 (16 R. 279); *Chase v. Isherwood*, 5 Dec. 1 (1 N. P. 31).

It is settled that a devise or bequest of the "issues and profits" or "use and benefit" of a body of real estate or of a sum of money without a devise or bequest over, conveys an absolute interest in the corpus of the gift, and that a life interest only must be plainly expressed.

Our conclusions, therefore are, that the legacy for Parker of \$3,000 vested in his behalf and in the trustee as of the death of Judge Long, and that it did not lapse at Parker's death but passed to his mother, the defendant, Harriet, under the will of Parker, and that the latter's interest in the brick block was an equitable interest in fee, the legal title whereof was in Dr. Long as trustee, and that, at Parker's death these two titles merged in fee in his devisee, Harriet Long, who should have her title therein quieted against not only Anna Tressler Long, but against the widow and devisees and legatees of Dr. Long and the heirs at law of Judge Long and John P. Long. It follows from this that the proceeds of the sale of the interest of the estate of John P. Long must be distributed in part to the liquidation of Harriet Long's claim for the legacy and that such claim is preferred over every other lien upon this fund save the costs and charges of sale except as she has waived its preference in favor of the insurance company's mortgage. However, as this legacy is not, by the terms of the will, payable until the death of Harriet Long, she is not now entitled to the full sum of \$3,000, but there should be paid her by the administrator in full liquidation of this lien, the present value of \$3,000 payable at her death, computing the same according to the customary method having reference to her expectancy of life.

Titus v. Winn.

GAS AND OIL.

[Licking Common Pleas, April Term, 1908.]

GEORGE W. TITUS v. S. M. WINN ET AL.

FORFEITURE OF LEASE FOR NONPAYMENT OF RENT NOT SAVED BY FAILURE TO TERMINATE LEASE AT DEFAULT.

A gas and oil lease containing a provision for forfeiture on account of non-payment of rent is not saved from forfeiture by failure of the lessor to declare the lease terminated at the time of the default; nor can an extension of time for payment be predicated on a conversation between the lessor and lessee, where the substance of what was said is in dispute and no claim is made that the extension was based on any consideration therefor.

[Syllabus approved by the court.]

Norpell & Norpell and O. A. Nash, for plaintiff.

S. M. Winn and J. C. Bassett, for defendants.

SEWARD, J. (Orally.)

This case is submitted to the court upon the petition, the answer, and the evidence. This is a proceeding brought to declare a forfeiture of an oil and gas lease situated in McKean township, this county. The ground of forfeiture is nonpayment of rent or royalty. A copy of the lease is attached to the petition. It bears date March —, 1904. It recites that, in consideration of the fact that there is already a well from which gas is being produced, that a royalty of \$200 shall be paid; the first payment shall be made March 1, 1905, and provides that, on failure so to do, the lease is to become void. It is not claimed that the rental provided for on March 1, 1905, was paid on that day, but \$100 was paid on the second or third day. I think the check evidencing the payment is dated in blank. The stub of the check bears date of March 2. There is testimony tending to show that it reached the lessor on the third, and he subsequently cashed it at the bank. It is claimed that the plaintiff agreed to accept the rental on a subsequent day. There was testimony which tends to show that a conversation took place between A. W. Evans, one of the defendants in this case, and Titus, the plaintiff in the case, at the Seiler Hotel, on March, 1905, the day that this rental was due—rental or royalty. Evans says that he talked with Titus on that occasion, and Titus admits that he was there. Evans says that he told him that they were a little close in funds—that is, the Granville Natural Gas & Fuel Co.; I may not get the name just right; but they were a little short; they said they might as well pay him interest as to pay it to someone else, and they agreed that they would send the money on a future date—pay him at a future day. Evans says that he called

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up Winn, at Zanesville, and put Titus in communication with Winn over the telephone; Winn says that someone talked to him over the phone. Titus denies that he ever talked with Winn, or went to the phone at all on that day. He says he didn't go to the phone, and didn't talk to anyone over the phone and that Evans didn't tell him to go to the phone.

It is claimed that this lease did not become void on the nonpayment effect of waiving the right of Titus to declare a forfeiture of this lease. It is not claimed that any consideration was paid for this extension of time, if there was any extension of time. It is not claimed that anything was paid, but simply that Titus said that he would pay it at a future day, or something of that kind; and Titus denies that. He says that he had a talk, but no such talk as Evans recites as having occurred. He says that he did not have any talk with Winn and did not go to the phone, and did not talk with him; Winn, of course, could not say whether Titus was at the other end of the phone or not. He says that he talked with someone. He does claim to be able to recognize Titus' voice, I believe, having talked with him but once on the premises where this gas well is located.

It is claimed that this lease did not become void on the nonpayment of the rental, because the forfeiture was not declared. And that probably would be the rule in an ordinary forfeiture of a lease; but I think a different rule obtains in relation to a gas lease and an oil lease; and that grows out of the fugitive nature of oil and gas; they are here today and there tomorrow; they are transitory, or migratory in their nature.

In the *Kenton Gas & Elec. Co. v. Dorney*, 9 Circ. Dec. 604 (17 R. 101), it is held that the lease in that case became forfeited by virtue of its own provision:

"Where the owner of real estate made a lease, granting the underlying gas and oil, with the right to drill wells in order to procure said products, which, if obtained, were to be divided between the lessor and lessee in certain stipulated ratios, and where the lease contained the provision that if no well is completed within one year from the date of the lease, then the grant shall be null and void, unless the lessee shall pay to the lessor, a certain amount of money agreed upon, for each year thereafter that such completion is delayed, and where the lessee did not complete a well within the year from the date of the lease and did not pay or tender the amount of money agreed upon until after the expiration of the year next after the date of the lease, which was then refused by the lessor, held:

"That the lease became forfeited by virtue of its own provisions and is void, and an election on the part of the lessor to terminate it, is not required."

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There is, substantially, the same holding in *Van Etten v. Kelly*, 66 Ohio St. 605 [64 N. E. Rep. 560]:

"An oil lease which required certain wells to be completed within stated times, contained the following: 'In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed.' Held, that this did not constitute a promise or obligation to pay rental; and held further, that the lessee had the option to complete wells, or pay rentals, to keep the lease alive; and that upon breach of the agreement to complete wells, no action would lie for the recovery of rentals."

This is a case that the court cited in the case of *Columbus Nat. Gas Co. v. Heisey*, unreported. The Heisey case was affirmed in the circuit court and went to the Supreme Court and was affirmed there. The court cited this particular case in the decision rendered in that case.

On page 611 the court says:

"As the only monthly rental provided for in the lease is that found in this 'unless' clause, and as that rental is to prevent the lease from becoming null and void, it seems fairly clear that the subsequent understanding that the monthly rental should apply to any well or wells not completed as therein specified, is for the same purpose, that is, to prevent the lease from becoming null and void, and that upon failure to pay such monthly rental in advance while the completion of any well was so delayed, the lease by its terms became null and void, and the lessor had the option to so treat the lease, and recover possession, or recover for use and occupation, or recover damages for breach of contract to drill the wells specified in the lease."

That is, he could have his election of remedies. But if he elected to declare the lease null and void, that was an election.

Again on page 611, the court says:

"But she could not recover rentals for breach of contract to complete wells, because there is no agreement to pay rentals for such breach, and there being no such agreement, there can be no breach thereof."

Meek v. Cooney, 26 O. C. C. 553 (5 N. S. 266), holds:

"Under an oil and gas lease providing that 'in case no well is completed within ninety days from this date, then this grant shall become null and void unless second party shall pay first party five dollars for each month thereafter said completion is delayed,' the lessee having done no drilling within the time specified, his failure to pay the monthly rental when it becomes due will render the lease void, unless it is shown by clear and convincing evidence that the lessor waived its payment; and after such default, lessee will be enjoined from drilling wells or extracting oil or gas from the premises."

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The court is not satisfied, by clear and convincing evidence, that there was any such arrangement made at the Seiler Hotel, with Titus, as would waive his rights to declare a forfeiture of this lease; and the court thinks this lease has become forfeited, and there may be a decree entered accordingly.

ATTACHMENT—BILL OF EXCEPTIONS—JUSTICE OF THE PEACE.

[Licking Common Pleas, April Term, 1908.]

SPEAKS & RYAN ET AL. V. F. LISEY & CO.

1. INTERLINEATION OF BILL OF EXCEPTIONS AND PASTING PAPER ON THE BILL HELD NOT FATAL IRREGULARITY.

An interlineation in the bill of exceptions from a justice of the peace, purporting to overrule the motion to discharge the attachment and extending the time for filing the bill of exceptions, together with the pasting on the bill of a piece of paper on which is written the apparent endorsement and allowance of the bill by the justice, will be presumed by a reviewing court to have been placed there in good faith and at the time stated, as against hints by counsel that these additions were made at a later date.

2. INSUFFICIENT EVIDENCE TO SUSTAIN ATTACHMENT.

Evidence that the constable, when he levied the attachment, simply marked certain goods as "attached" but made no further effort to take possession of them, notwithstanding the expressed willingness of the defendants that sufficient goods should be taken to satisfy the claim, does not support the charge in the affidavit that the defendants were about to dispose of their property with intent to defraud their creditors, although it appears that the defendants did soon afterward make an assignment for the benefit of their creditors.

[Syllabus approved by the court.]

ERROR to justice's court.

A. A. Stasel and E. S. Randolph, for plaintiff in error.

Smythe & Smythe, for defendant in error.

SEWARD, J. (Orally).

This is a proceeding in error from the docket of Lee S. Lake, justice of the peace. An affidavit in attachment was filed before the justice against the defendant by Fred Lisey & Co. The case is brought here upon a petition in error. The testimony is all set out. It is claimed that there is error in the proceedings of the justice in failing to sustain a motion to dismiss the attachment on the ground that the affidavit is insufficient; that the facts stated in the affidavit are untrue, and that the attachment was not valid because the constable did not take possession of the property.

The record shows that the property was a stock of goods in a store

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building in this city; that the constable on the nineteenth of November, after having had this writ of attachment placed in his hands, went to the store room and marked "Attached" on some of the property that he returned as levied on by the proceeding in attachment. The record does not disclose that he took any other possession of the property. I think the record is pretty clear on that proposition; that the constable did not take possession of the property. It shows that no appraisal was made until the next day, after the property had been assigned to Randolph, as assignee for the creditors of Speaks & Ryan. But it is claimed, and the record tends to show, that Speaks & Ryan offered the plaintiff the right to take such property as would satisfy his claim.

The principal ground of the attachment, and *the* ground as set out in the affidavit, is that they were about to dispose of their property with intent to defraud their creditors. They made an assignment for the benefit of their creditors, and they were frank enough, when Lisey was there, to offer to let him take out property sufficient to satisfy his claim. They seemed to want to pay their creditors. This was before the affidavit was made.

It is claimed that there is no bill of exceptions here, because the bill of exceptions was not presented to the justice within the time required by the statute. The justice has the right to extend the time for presenting a bill of exceptions for a period not exceeding ten days and not less than five days, if required or requested by either party. The following is interlined, and it is mildly suggested that it was interlined after the bill of exceptions was signed. It says:

"The motion in attachment overruled, to which defendants excepted." After that, appears these words: "Saying he had ten days within which to file a bill of exceptions, to which the justice replied: Alright."

It is claimed by one of the parties that that was not an extension of the time for a period of ten days within which to prepare and sign the bill of exceptions. The court thinks that if that occurred there, that was an extension of the time under the statute to prepare and present the bill of exceptions to the justice of the peace for his signature.

It is claimed that the court has the right to go to the original papers to find out about the matter. The court is governed by the bill of exceptions, which is signed by the justice of the peace. These words are pasted on the bill of exceptions—on a piece of yellow paper, the kind that we used in taking notes here, and it is mildly intimated that this was done after the bill of exceptions was signed:

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"December 18, 1906, the defendant presented its bill of exceptions herein, which embodies all of the evidence, both parol and written, which was adduced on the hearing of the motion to discharge the attachment herein.

"In consideration whereof, the court finds that said bill of exceptions does include all of the evidence adduced on said hearing, and said bill of exceptions is allowed, and this day filed."

If the court is right in its conclusion, that the announcement of the justice gave to the exceptors ten days within which to file a bill of exceptions, and this motion for the dismissal of the attachment was overruled on the twelfth of December, then this bill of exceptions was presented in time. The court is not going to guess at this matter, as to whether this was on here or not. The court presumes that it was on when signed by the justice. While it is a bad way to get up a bill of exceptions, and ought not to be allowed by the justice of the peace, yet, the court is not going to presume bad faith because of any of these charges, that they pasted this on the bill of exceptions after it was signed by the justice of the peace. Counsel should not permit anything of that kind to be done, where it would give ground for such an attack as is made in this case. The court thinks this is the bill of exceptions signed by the justice of the peace, and the court goes to the bill of exceptions to find what the record shows.

Now, as to the evidence. The court is thoroughly satisfied that the affidavit of the plaintiff was not sustained by the evidence at all; that these parties were not attempting to dispose of their property with intent to defraud their creditors. There isn't any evidence that tends to show this; and if this case had been appealed under Sec. 6494 Rev. Stat., the court would have no trouble with the case at all, in sustaining the motion to dismiss the attachment, and has very little trouble with it, on the bill of exceptions.

The petition in error is sustained, and the judgment of the court below is reversed.

State v. Railway.

COURTS—RAILWAYS—STATUTES.

[Jackson Common Pleas, October, 1908.]

*STATE OF OHIO V. DETROIT, TOLEDO & IRONTON RY.

1. STATE STATUTE REQUIRING AUTOMATIC COUPLER EQUIPMENT NOT IN CONFLICT WITH FEDERAL STATUTE.

Act 98 O. L. 75, providing for automatic couplers on railroad cars moving state traffic is not in conflict with the federal statute (27 Stat. at L. 531) requiring automatic couplers on cars moving interstate traffic.

2. PRESENT OR ACTUAL USE OF CAR DETERMINES JURISDICTION FOR PROSECUTION FOR VIOLATION.

The "car," not the "train," is the unit of control in determining violations under both state and federal statutes requiring automatic coupler equipment, and jurisdiction is based upon the actual or intended use of the car as an instrumentality of traffic; the fact that a car is in a train moving interstate traffic or has been commonly used in interstate traffic cannot save it from operation of the state statute if at the time complained of it is being used within the state for transportation of exclusively state traffic.

DEMURRER to the answer.

W. H. Miller, Asst. Atty. Gen., and E. E. Eubanks, Pros. Atty., for plaintiff.

Smith & Robbins, for defendant.

MIDDLETON, J. (Orally.)

This is an action brought to recover a penalty of one hundred dollars provided for by act 98 O. L. 75 passed by the general assembly of this state, on March 19, 1906, which provides:

"That it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars."

The petition, in substance, alleges that the defendant company is a corporation organized under the laws of the state of Michigan, and is engaged in operating a line of railroad from the city of Detroit, in said state, to city of Ironton in this state, and that the line of said railroad company passes through this county.

It alleges further that on or about January 17, 1907, the defendant company hauled upon this line of railroad, in its business as a common carrier in this county, a certain railroad car, to wit, No. 4161; said car being then and there used for moving state traffic in train second 54; said car being deficiently equipped so that the same could not be uncoupled from the other cars of said train without the necessity of a man going between the end of said car and the end of the other

*Affirmed, Detroit, Toledo & I. Ry. v. State, 31 O. C. C. 100

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cars of said train, etc. The petition prays, therefore, for judgment against the defendant in the sum of \$100.

Now, it will be noticed in this connection that this petition brings the case clearly within the provisions of the state law which I have just read, the operative fact of the petition being that this car in question was then and there used for moving state traffic.

The defendant company has filed an answer to this petition, and for a first defense sets up, in substance, that it was at the time complained of in the petition a common carrier engaged in the business of interstate commerce and that its line of railroad and all its locomotives and cars, including the car described in the petition, are and *were commonly used and engaged* in interstate traffic. That is the first defense.

The second defense, in addition to what I have already stated, sets up that other cars in the train—this second 54 train described in plaintiff's petition—were actually loaded with traffic consigned from points in this state to points in another state.

Now, the claim of the defendant company upon these two defenses is, in substance, that it is within the exclusive power of congress to regulate traffic between the states, as well as the instrumentalities of such traffic, which would include, of course, cars, locomotives and trains, and that therefore in the case where a common carrier is engaged in interstate traffic, as distinguished from state traffic, all its cars, locomotives, and other agencies of traffic are withdrawn from the control of the state and come under the control of congress alone, and that this act of the state of Ohio, in so far as it seeks to control these agencies, is unconstitutional and void.

In 1893 the congress of the United States passed an act similar to the state act I have just read, which provides, in Sec. 2 thereof:

"That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier [that means railroad companies engaged in interstate commerce] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (27 Stat. at L. 531.)

It will be observed that these two laws, the state law and the federal law, are practically identical in defining the subjects sought to be controlled by their provisions and if it were true, as claimed here by the defendant company, that the car in question in this case comes within the provisions of this act of congress, and under the conditions specified in said act, it will not be questioned, I think, that the state law cannot apply. In other words, there can be no dual control of this car in question by the state and federal government at the same time.

Now, very elaborate briefs have been filed by counsel for the de-

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defendant company, as well as the attorney-general of this state and the prosecuting attorney of this county on behalf of the plaintiff, and it seems that the question involved in this case is regarded by all parties as a very important question.

I have very carefully examined the authorities cited by counsel upon both sides, as well as the authorities which I have been able to find myself, and from all the authorities examined, I have concluded that under the federal law, before there can be a violation thereof, it must appear:

First. That the car in question must be in actual use as an instrument of interstate traffic, as distinguished from state traffic; or,

Second. It must be shown that it was the intention of the common carrier to so use the car.

Now, I think these two propositions are clearly shown by the federal authorities under this statute. Take for instance *Johnson v. Railway*, 196 U. S. 1 [25 Sup. Ct. Rep. 158; 49 L. Ed. 363]. In that case the court holds that it was not necessary that the car involved in that case should actually be engaged in interstate movement but if it appears sufficiently that it was the intention of the defendant company to so use the car, it is a violation of the federal statute, if the car is not equipped as that statute requires.

In this connection it must be further observed that these two laws, by their very terms, do not apply to anything more than a car or single agency, and that they do not apply to trains. The train is not the "unit," in other words, which the two statutes seek to control; it is the car, and it can readily be seen that a case will frequently arise in which a part of a single train will be devoted to interstate commerce, and the remainder of that train will be devoted to state traffic.

In order then to give the federal statute that scope and application which the defendant claims in this case, the court would be compelled to apply the statute not to the separate car, but to the train as a whole. I think, and I so hold, that the statute does not intend anything of that sort.

It is the purpose of both laws—both the federal laws and the state law—to apply solely to a single car or instrument of commerce, and the use or intended use of the particular car in question must determine which law applies. These two laws are not contradictory or conflicting in their terms. There is nothing in the language of the state law which conflicts in any way with any of the provisions of the federal law, or by its language undertakes to control the same thing which federal law controls.

The language of the federal law is, "any car used in moving interstate traffic." The language of the state law is, "any car used in moving state traffic," and that the state has the right to control in cases

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of state traffic is recognized by the federal courts. *Voelker v. Railway*, 116 Fed. Rep. 867, 873. The court says in construing the federal statutes:

"Legislation on this matter of the use of automatic couplers was sought and obtained from congress as well as from the state legislatures; so that the companies would not be afforded a loop-hole for escape from liability on the theory that the agencies used in interstate commerce are without the control of the state legislation."

This language clearly implies the conclusion that because today these agencies might come under the provisions of the federal law, it does not necessarily follow that tomorrow the same instrumentalities, the same agencies, the same cars, might not come under the state law. That which determines which law should apply, is the use or intended use of each particular car at each particular time. The federal courts are always particular to qualify every expression by limiting it to interstate traffic.

The court further says in this case:

"When companies * * * are engaged in interstate traffic, it is their duty, under the act of congress, not to use, in connection with such traffic, cars that are not equipped as required by that act."

It necessarily follows that if the same companies are at the same time engaged in state traffic, it is their duty, under the state law, not to use in connection with state traffic, cars which are not equipped as required by the state law. It is the present use of the car that controls, not the general character of the train in which the car may be, nor the general character or nature of the business in which the common carrier is engaged.

In this case it was held that it was not necessary in order to bring the car within the provisions of the federal statute, that it be actually in use as the agency of interstate commerce, but it was sufficient if it appeared that it was designed, or intended by the common carrier to use it for that purpose. So that I am of the opinion that these two statutes do not conflict in any way, and that the only case, after thinking the matter over, in which there might be a serious question for the court, would be a case in which a car was loaded partly with state traffic and partly with interstate traffic. Now, that might occur. It might occur upon the line of the defendant company in this case, and it probably might happen that this company, along the northern part of its line in this state, would place in some car that was partly loaded with traffic designed for some point in Michigan, some article or some merchandise that was designed for some point in the state of Ohio.

In that case the court would then have this question to meet, but not under the facts as they appear in this case.

The petition alleges that this car in question was being used for

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moving state traffic. Neither the first nor second defenses in the answer denies this, but the defendant simply claims that this car *was commonly* used in interstate traffic, as well as all of its other cars and locomotives. It is not the common use of the car which determines the question. As I said before, it is the present use of the car, or the present intended use of the car which controls. The defendant says in the second defense there were a number of cars in the train which were being then used for interstate traffic. But it is of no consequence to what use all the other cars in that train were being put. The court is only dealing with the car described in the petition.

Now, for a third defense, the defendant alleges that it had in its employ a sufficient number of competent inspectors, whose duty it was to properly inspect all cars and equipment, and that said inspectors went over and inspected this train, and all cars and equipment were in good repair and condition. I think this defense is very fully covered by the case of *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 76 [87 Am. St. Rep. 547; 55 L. R. A. 99].

The demurrer to the answer, and to each defense of the answer, will be sustained.

CRIMINAL LAW—INTOXICATING LIQUORS.

[Coshocton Common Pleas, December 28, 1908.]

DANIEL LAMMA v. STATE OF OHIO.

1. SUFFICIENCY OF AFFIDAVIT IN ROSE COUNTY LOCAL OPTION LAW PROSECUTION.

An affidavit upon which is based a prosecution for violation of act 99 O. L. 35, the Rose county local option law, sufficiently complies with Sec. 5 of such act defining sufficiency of affidavits, etc., that sets out the conduct of the accused complained of, the time and place of its commission, the person to whom the intoxicating liquors were sold or furnished as a beverage and averring that such furnishing, etc., was prohibited and unlawful.

2. FURNISHING INTOXICATING LIQUORS COMPREHENDS ALL MODES OF CHANGING POSSESSION BUT THAT OF SALE.

"Furnish" as used in act 99 O. L. 35, making unlawful the furnishing of intoxicating liquors as a beverage to another within prohibited territory, should be given its most catholic meaning and comprehends not only giving it away but all other modes of putting intoxicating liquors in the power of another for beverage purposes not amounting to sales thereof.

3. BEVERAGE PURPOSES AS APPLIED TO FURNISHING INTOXICATING LIQUORS COMPREHENDS ALL ILLEGAL USES.

Using intoxicating liquors as a beverage means more than mere use as a drink. Hence, a furnishing of intoxicating liquors for any other than legitimate legal purposes constitutes a furnishing for beverage purposes and violates act 99 O. L. 35 in territory within which such traffic is prohibited.

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4. FINE OF \$200 DEEMED NOT EXCESSIVE.

A fine of \$200 by a magistrate, the heaviest penalty authorized by act 99 O. L. 35 for violation of its provisions, is not excessive upon conviction of accused for furnishing intoxicating liquor for distribution as a beverage by a boot-legger.

[Syllabus approved by the court.]

ERROR to Mayor's court.

J. C. Adams, for plaintiff in error.

J. L. McDowell and Levi Williams, for defendant in error.

NICHOLAS, J.

This cause comes into this court upon an application by the plaintiff in error for leave to file a petition in error to this court from the Mayor's court of the city of Coshocton. The statute (act 99 O. L. 35) requires that in cases of this kind the petition shall only be filed upon notice and hearing. It therefore becomes the duty of this court to look into the record of the Mayor's court and the assignments of error by the plaintiff in error to discover whether or not there are grounds for the filing of such petition, and in doing this I have made my examination as thorough as I should have done if the hearing had been upon a petition in error and bill of exceptions, the same having been filed under the general statute which does not require an allowance before the filing of the same.

An examination of the record in this case discloses that this was a prosecution of the defendant below, charging him with a violation of the county local option law passed March 5, 1908, 99 O. L. 35, the affidavit in the case charging him with having furnished intoxicating liquors to one Edward Stewart on or about December 1, 1908, in the city of Coshocton, Coshocton county, Ohio.

The first error assigned by the plaintiff in error is that the court erred in not sustaining defendant's motion to quash the affidavit filed in the case. The affidavit is in substance as follows: That on or about December 1, 1908, in the city of Coshocton, Coshocton county, Ohio, this defendant did then and there furnish intoxicating liquors as a beverage to one Edward Stewart. That the furnishing of intoxicating liquors as aforesaid by the defendant was then and there prohibited and unlawful.

Under the general practice it would probably be at once conceded that such an affidavit would hardly be sufficient, but in Sec. 5 of the said act of March 5, 1908, the legislature has provided that,

"In indictments, affidavits or information for violation of this act, it shall not be necessary to set forth the facts showing that the required number of electors in the county petitioned for an election and that the election was held, or that the majority voted in favor of prohibiting

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the sale as herein provided. But it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

In other words, under this section of the act it is only necessary to set out the conduct of the defendant complained of, the time and place of its commission, the person to whom the intoxicating liquors were furnished, and the further allegation that the same was prohibited and unlawful, and this I find the affidavit contains. I therefore fail to find any error on the part of the mayor in refusing to quash the information.

The second assignment of error is that the court erred in not sustaining the defendant's motion to dismiss said cause at the time the state rested and discharge the defendant. This assignment raises for the first time, among the many assignments of error, the most important and troublesome question found in the investigation of this case. The act of the defendant complained of in the affidavit is the furnishing to Stewart of intoxicating liquors as a beverage within prohibited territory. The testimony in support of this complaint as introduced by the state discloses this state of facts: That in the home of this defendant there was kept a considerable quantity of intoxicating liquors, described by the witnesses for the state as whiskey. That whiskey is an intoxicating liquor has been many times judicially decided by the courts of our various states. This liquor was kept in the home of this defendant for some purpose, the amount thereof being largely in excess of the amount kept by the ordinary citizen for his own personal consumption, and kept too in vessels of such size as not ordinarily used for that purpose. The witness Stewart says that he was authorized by this defendant to dispose of this liquor by sale. This fact, of course, at this period in the testimony was not yet disputed by the defense.

The testimony further discloses that Stewart did dispose of some of this liquor, particularly that sold to one Frederick, and quite probably to some others. It is not disclosed by the testimony, however, that the liquor was furnished by this defendant to Stewart to be used by Stewart personally as a beverage. The question therefore arises, what is the legal meaning of the word "furnish" as used in that statute?

Our own Supreme Court in *State v. Munson*, 25 Ohio St. 381, has held that where an adult purchases two drinks of whiskey at a counter, takes one himself and passes the other to a minor, that the saloon keeper may be convicted of furnishing intoxicating liquor to a minor, upon the theory that though the adult bought and paid for the liquor for the minor, the bar tender is guilty of furnishing, but in this state no broader signification has yet been attached to that word, and we must therefore look elsewhere for a more comprehensive definition of it.

In *State v. Freeman*, 27 Vt. 523, I find this language:

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"The word 'furnish' would include both selling and giving away and every other mode of putting spirits in the power of another. Selling seems to be one distinct mode of offense by itself. Furnishing was intended only to include such furnishing as was done by dealers in the article where it was not in terms sold. It may include other modes of affording it to others beside giving away, but clearly does include this."

In the case of *People v. Neumann*, 85 Mich. 98 [48 N. W. Rep. 290], that court say:

"The word 'furnishing' in the statute making the furnishing of intoxicating liquors to minors a crime, is somewhat broader than the word 'giving' and means letting a minor have liquor, and therefore a saloon keeper who without protest allows an adult to buy intoxicating liquor and give it to the minor to drink, is guilty of violation of the statute."

And in *Dukes v. State*, 77 Ga. 738 [4 S. E. Rep. 876], that court say:

"Selling or furnishing liquor within the meaning of the statute making it a crime to sell or furnish intoxicating liquor, includes the selling or giving away of a quantity of whiskey for the use of a sick person."

It will be seen that this expression "furnishing" is the broad, comprehensive term used to describe any mode of putting spirits in the power of another, and as I read and understand the purpose in the minds of the legislature when they passed this law, I am impressed with the idea that they intended to give to this word its most catholic meaning, that meaning which the supreme court of Vermont gave to it for the very purpose of executing and carrying out the will of the people as expressed at the ballot box.

I therefore find that there was no error committed by the court below in refusing to discharge this defendant upon the motion filed when the state rested its case.

As to the third and fourth assignments that the court erred in admitting evidence on behalf of the state and rejecting evidence offered by the defendants, I fail to find anything therein prejudicial to the rights of this defendant.

The fifth assignment is, that the judgment and finding of the court was contrary to the evidence. This assignment raises the question of the weight of the evidence. What I have already said will sufficiently indicate that there was sufficient evidence offered by the state to justify the conviction of this defendant. And now, has the testimony offered by the defendant so weakened that testimony as to require at the hands of the court below an acquittal? I most certainly think not, for I have no hesitation in saying that in all the criminal cases in my experience

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on the bench and at the bar, covering a period of more than a quarter of a century, I have never seen a defense which bore more unmistakably the evidence of manufacture than does this one.

Assuming that this defendant actually bought or in any wise obtained the quantity of liquor which he says he did just before this county went dry, what was his object in so doing? Can anyone believe that a man in his financial condition, living with his little family in quarters such as he occupied, with no more means than he had, would purchase so large a quantity of liquor for his own personal use, and if he did, it would then have been his duty to have safeguarded that against its being used in violation of the law, and, moreover, what was meant by the expression of his wife to him on the night of his arrest that "if he had done as she wanted him to this trouble would not have occurred?" The story of emptying one of these jugs for butter-milk is too unskillfully planned to mislead anyone, and was only manufactured because they both saw the necessity of making some explanation for keeping liquor in small bottles instead of jugs. The story hasn't even the semblance of truth behind it, and instead of weakening the case as made by the state, it only tended to strengthen and fortify the claim as made by the state, and the story as told by the witness Stewart that this private house had been converted into a storehouse for boot-legging and this defendant was furnishing liquor for distribution by a boot-legger as a beverage.

Using intoxicating liquor as a beverage means something more than the mere using of it as a drink. It, like the word "furnish," has a broader, more comprehensive meaning than is sometimes given to it.

In *Commonwealth v. Mandeville*, 142 Mass. 469 [8 N. E. Rep. 327], the court say:

"The use of liquors as a beverage does not mean simply that the same is to be drunk, but the word 'beverage' is used to distinguish the act of drinking liquor for the mere pleasure of drinking from its use for medicinal purposes."

So that if this liquor was furnished for any other than a legitimate legal purpose, it was being furnished as a beverage and it is not claimed in this defense that this defendant was dispensing it with any medicinal object in view.

I therefore fail to find that the finding of the court below was contrary to the evidence.

The sixth error assigned, that the judgment and finding of the court is contrary to the law and the evidence, has been fully answered in what I have said with reference to the prior findings.

The seventh assignment is that the sentence of the court and fine imposed is excessive. By reference to the record, I find that the court imposed the penalty of \$200 and the costs of the prosecution, and in

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default the commitment of the defendant to the Columbus workhouse. This is the heaviest penalty authorized by the statute, and when I consider that this defense was absolutely bereft of merit, that in addition thereto this defendant called his own wife as a witness and had her lend her name to this tissue of falsehood, and permitted her to cover herself with shame in the story which she told, I can only feel that the legislature probably limited the officer in the fixing of this penalty by limits too narrow to mete out a proper punishment.

There was, therefore, no imposition of an excessive penalty. In the full examination of this record I find no error. The application, therefore, for leave to file a petition in error is refused.

MUNICIPAL CORPORATIONS—STREET RAILWAYS.

[Lorain Common Pleas, 1908.]

ELYRIA V. CLEVELAND, S. W. & COL. RY.**1. TERMS AND CONDITIONS UPON WHICH MUNICIPALITY MAY GRANT STREET RAILWAY FRANCHISES.**

In Ohio a municipal corporation in granting a street railroad company permission to construct a street railroad in the streets of the city, may at least prescribe such terms and conditions as are in furtherance of the duty which the municipal corporation owes to the public and are essential to the preservation of the streets for public use, provided such terms and conditions are not inconsistent with the restrictions placed upon, nor inconsistent with the rights granted to such street railroad company by the legislature.

2. CONTRACT BY STREET RAILWAY TO PAY STIPULATED SUM OF MONEY TO WIDEN BRIDGE CROSSED BY IT, HELD NOT INVALID.

When an extension of an existing franchise is granted, the city has authority to prescribe that the street railroad company shall widen a bridge occupied by it or in lieu thereof pay a stipulated amount to the city, at the city's option, and such provision, when the ordinance containing the same has been duly accepted by the street railroad company, becomes an agreement binding the street railroad company to the performance of the same.

[Syllabus by the court.]

DEMURRER.

H. A. Pounds, city solicitor, and **M. B. & H. H. Johnson**, for plaintiff.

C. W. Collister, **E. G.**, **H. C. & T. C. Johnson** and **Thompson, Glitsch & Cinniger**, for defendant.

WASHBURN, J.

The petition in this case discloses that the plaintiff is a municipal

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corporation and the defendant is a private corporation, owning and operating an electric railroad which on October 22, 1907, extended through the city of Elyria and over and across a certain bridge in the city of Elyria.

On October 22, 1907, the plaintiff passed an ordinance granting to the defendant "a renewal of previous grants and granting a right to lay certain street railroad tracks in the city of Elyria and the right to extend certain street railroad tracks and to lay additional tracks in streets of said city and the right to construct, maintain and operate a street railway in, upon and over certain streets in said city, together with the right to construct, maintain and operate all the necessary poles, wires, fixtures and appliances requisite for the construction, maintenance and operation of the said street railway; that said rights were granted in consideration of certain agreements and contained certain conditions named in said ordinance, among which was:

"The railway company, by the acceptance of this ordinance, agrees as follows:

" 'To pave the roadway of the bridge on East Bridge street on which its tracks are now located, with the same material and in the same manner as East Bridge street at the place adjoining said bridge is now paved, and to widen said bridge to the full width of roadway, or in lieu of widening said bridge, to pay to the city of Elyria, the sum of \$15,000, at the city's option, which widening shall be fully completed on or before October 1, 1908, or in case the city exercises its option of accepting the money in lieu of said widening, that said money shall be paid into the city treasury on or before March 1, 1908.' "

Said ordinance was approved by the mayor on October 28, 1907, and thereafter duly published, and said ordinance was duly accepted in writing by the defendant on October 28, 1907, "by the terms of which written acceptance, said defendant agreed to be bound by the obligations and conditions which said ordinance imposed upon said defendant." Said city "on November 26, 1907, by resolution duly passed, elected to accept said \$15,000 in lieu of the widening of said bridge and on November 29, 1907, duly notified said defendant in writing that plaintiff had so elected."

The defendant failed to pay said \$15,000 on or before March 1, 1908, and the plaintiff on March 5, 1908, made written demand for the same, but the defendant has wholly failed to make any payment whatever. The prayer of the petition is for judgment for \$15,000 and interest.

Copies of said ordinance and written acceptance thereof are attached to the petition, but not made part thereof.

A demurrer has been filed to this petition, the claim being that the city had no right or authority in law by a condition in said ordi-

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nance to make a contract with the defendant for the payment of said \$15,000

Certain sections of the Revised Statutes of Ohio will be considered in determining this question, and it may be proper to read them now.

Section 3437. "Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village; and offices, depots, and other necessary buildings for such railways may also be constructed."

Section 29 of the Mun. Code of 1902 (Lan. Rev. Stat. 3763; B. 1536-183). "The right so to construct or extend such railway as provided in Sec. 3437 Revised Statutes of Ohio, within or beyond the limits of a municipal corporation can be granted only by the council thereof, by ordinance, * * * and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provision of Sec. 2501 of the Revised Statutes of Ohio and Sec. 30 of this act."

Section 2501 (Lan. Rev. Stat. 3767; B. 1536-184). "No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

Section 30 Mun. Code of 1902 (Lan. Rev. Stat. 3764; B. 1536-185). "Nothing mentioned in section 2501 of the Revised Statutes of Ohio shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council; and no ordinance for the purpose specified in section 2501 of the Revised Statutes of Ohio shall be passed until public notice of the application therefor has been given by the clerk of the corporation once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation; and no such grant as mentioned in section 2501 of the Revised Statutes of Ohio shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon said proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the

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property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed.

“Provided, that no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of the grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.”

From a consideration of these and other statutes and an examination of the authorities I am of the opinion that the streets and highways belong to the state and are under its control, but the state has placed the street of a city under the control of the city authorities, subject to such regulations and restrictions as the state has or may hereafter see fit to impose. The statutes of Ohio confer upon municipal corporations plenary power of control over their streets and has vested in them the fee thereof, in trust for and to the use of the public for said purposes, subject to the right of the state to direct the mode of administering that trust, or even to administer it for itself. So far as the state has undertaken to do this, its action is, of course, binding upon the municipal corporations of the state.

The view most favorable to the defendant in the case at bar is that the state has conferred upon a corporation organized for street railway purposes the right to construct and operate a street railroad in municipal corporations, by Sec. 3437 Rev. Stat.—conditioned upon the city's yielding its permission under the regulations prescribed by law. And granting that the defendant derived its power to construct its railway in the streets of Elyria from the state, which I am inclined to think is the correct view, the question is, what terms and conditions under the laws of Ohio had the city a right to prescribe before it yielded its permission to the use of its streets by the defendant company?

Under the view of the law here taken, it could prescribe only such terms and conditions as the state had granted it authority to prescribe. Under Sec. 2501 Rev. Stat., heretofore quoted, the city in granting permission to use its streets for a street railway is given authority to “prescribe the terms and conditions upon and the manner in which the road shall be constructed and operated.”

What “terms and conditions” are authorized to be made by the cities under this authority? Very few terms and conditions are prescribed by the legislature itself and such as there are I will refer to later, and the policy of the law seems to be to leave to the local au-

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thorities the right to prescribe the many and varied terms and conditions appropriate to the different localities and which must always be agreed to by the companies receiving the permission to construct and operate a street railroad in the streets of the cities. This policy is convenient and affords protection to local interest. Whether or not a certain route is practical or desirable, what motive power should be adopted, whether the road should be single or double tracked, the kind of rails to be used, what the gauge of the track should be, how frequently cars should be run and between what hours, regulations as to street paving and repairs, joint use of tracks by different companies and regulations as to the removal of snow and the sweeping and sprinkling of tracks, are a few of the questions which may arise, and for imperative local reasons, governed by time, place and circumstances, they may be decided differently for various cities and villages, yet wisely for all. Hence, the legislature of this state has adopted the policy of permitting the local authorities and the corporations to settle these matters by agreement made at the time permission is granted.

But it is said that the legislature having specifically provided for certain terms and conditions which municipal corporations may require, has indicated a legislative intent or policy to restrict the power of the council in prescribing terms and conditions to those things which are specifically provided for.

It is true that at the time the original section which is now Sec. 2501 was passed, the legislature as a part of the same act gave authority to municipal corporations to "require any part or all of the track between the rails of any street railroad constructed within the corporate limits, to be paved with stone," etc., and at the same time required the council, when the street was less than sixty feet in width, to prescribe certain conditions as to the crown, curb and gutter of the street (Secs. 2503, 2504).

If I understand the contention of counsel it is that municipal corporations in Ohio are restricted to these terms and conditions for which specific provision has been made by the legislature and to such regulations as can be made under their general police powers. In my judgment such a construction of the acts of the legislature is not warranted.

In the first place, whatever regulations municipal corporations have a right to make under their police powers, can be made without making them the subject of an agreement in an ordinance granting permission to use the streets, and therefore there is no necessity for including them in such ordinance. *Townsend v. Circleville*, 78 Ohio St. 122. And in the second place if the power of the municipal corporations be limited merely to the matters of pavement, curb and gutter provided for in Secs. 2503 and 2504 Rev. Stat., then no force

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or effect or meaning whatever is given to Sec. 2501 where municipal corporations are given the general authority to "prescribe the terms and conditions upon and the manner in which the road shall be constructed and operated."

The better rule seems to be that while these matters for which specific authority is granted may be considered in arriving at the general policy of the legislature, the powers of municipal corporations are not limited to them and that while municipal corporations have authority to make terms and regulations such as are specifically provided for in these statutes, they also have general authority to provide terms and conditions as provided for in Sec. 2501 Rev. Stat. But, of course, they cannot legally insist upon such terms and conditions as are inconsistent with the rights granted to the company by the legislature, *State v. Traction Co.* 10 Circ. Dec. 212 (18 R. 490), nor inconsistent with the restrictions already placed upon the company by the legislature, nor such as contravene the policy of the law as shown by all the legislation on the subject.

An act of the legislature which may be considered together with these other laws in determining the general policy of the legislature of this state is contained in the municipal code of 1902, wherein the legislature authorized the public authorities in certain cities where street railways were being operated under grants exacting car license fees, to agree with the companies for the payment of a percentage of their gross receipts as a substitute for such car license fee, thus recognizing the right of municipal corporations to exact such car license fees under its general authority to prescribe the terms and conditions upon which the street railroad should be constructed and operated (Sec. 30 Mun. Code of 1902).

It is the common practice to insert many terms and conditions in franchises of this kind, and, strange to say, very few of these have ever been tested in the courts of this state, and in none of the cases where tests have been made has the question raised by demurrer in this case been determined.

The power given to municipal corporations to prescribe terms and conditions is general, but, of course, it is not unlimited. Terms and conditions which would contravene the policy of the law as shown by all the legislation on this subject, are not warranted. Accordingly, it has been held that the city has no right to determine the method in which differences between the company and its employees should be settled, nor reserve in an ordinance a right to purchase at a future date, for those matters are contrary to the spirit of the law. *Raynolds v. Cleveland*, 24 O. C. C. 215 (2 N. S. 139). This holding is based upon the fact that such terms and conditions tend to keep persons from bidding and to increase the rate of fare, and it is said in argument that

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the terms and conditions prescribed by the ordinance in the case at bar are likewise contrary to the spirit of the law, because they, too, tend to keep persons from bidding and to increase the rate of fare.

But a complete answer to this contention is found in the allegations of the petition which show that the case at bar was an extension and that no bids were asked for or received. This case is not one where a new route was established and an original grant made to the lowest bidder, and whether or not in such a case the terms and conditions complained of in this case could be enforced, is not before the court. Here we have an extension of a former grant and the terms and conditions complained of refer to the repair and widening of a bridge then occupied by the defendant's tracks.

The legislature has placed the control of streets in the municipal corporations and has placed upon those corporations the duty of keeping said streets open, in repair and free from nuisance. It has also provided that the right given to street railways by Sec. 3437 Rev. Stat. to construct or extend their railways within the limits of a municipal corporation "can be granted only by the council thereof by ordinance." The legislature has also provided that in granting such permission municipal corporations shall have authority to "prescribe the terms and conditions upon and the manner in which the road shall be constructed and operated."

Now, from the consideration of these statutes and the other statutes to which reference has been made, and considering the fact that the terms and conditions insisted upon by municipal corporations must be agreed to by the street railroads before they are of any force and effect, and considering that local reasons governed by time, place and circumstances may call for varied and different terms and conditions appropriate to the different localities, I am of the opinion that the legislature of this state has adopted the policy of permitting the local authorities and the street railway corporations to settle by agreement made at the time the permission is granted all such matters as are in furtherance of the duty which a municipal corporation owes to the public and are essential to the preservation of the streets for public use.

How is this policy contravened by an agreement such as was made in the case at bar? The defendant company had its tracks upon the roadway of the bridge on East Bridge street. It desired to have its right to use said bridge extended beyond the time covered by the original permission. Accordingly the city and the company agreed to the provisions of which complaint is made, the company agreeing to pave the space between its rails on said bridge and to widen said bridge to the full width of the roadway, or in lieu thereof to pay \$15,000. so that the city itself might widen said bridge, said widening being

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made desirable if not necessary, in part at least, by the defendant's occupancy of the same, and the city on its part, in consideration of the promise of the defendant to pay said sum, agreed to such extension.

Assuming that the legislature granted the defendant company the right to build its line over said bridge, it did not thereby place a burden upon the municipal corporation by requiring it to build or repair the bridge for the benefit of the defendant. The legislature placed the duty of keeping that bridge in repair upon the plaintiff. It also gave to the plaintiff the absolute right to decline to extend the right of the defendant to use said bridge. How can the spirit of the law be violated by permitting the plaintiff to refuse to extend the defendant's right to use that bridge unless it bears the burden of widening it so that the general public shall not be deprived in whole or in part of its right to use said bridge? Considering all the authority that is vested in the municipal corporation in reference to this matter, surely it had a right to protect itself against such burden.

The city council having control over its streets and being charged with the duty of keeping them open and in repair for public use, and having the right to grant or withhold permission for the use of the same by a street railway, and having the general right to prescribe terms and conditions if such permission is granted, when called upon to give consent may prescribe terms which embrace the doing of all those things necessary to the preservation of the street for public use.

If the agreement had been simply for the widening of the bridge, I cannot conceive how anyone could consistently claim that that was contrary to the spirit of the law, and the fact that the agreement provided for the payment of money in lieu of said widening, being manifestly for the purpose of accomplishing the same object, does not, in my judgment, make the provision contrary to the spirit of the law.

The council had a right to insist at least upon such terms and conditions as were not inconsistent with the rights granted to the company by the legislature and which were not inconsistent with the restrictions already placed upon the company by the legislature and which did not contravene the policy of the law as shown by all the legislation on the subject.

The provision in question is not prohibited by any of these considerations and I therefore hold that the city had a right to enter into the agreement and that the defendant, having agreed thereto, is bound thereby so far as this demurrer is concerned.

My attention has been called to the legislation and decisions in this state in reference to telephone companies but the legislation as to street railroads is so different from the legislation as to telephones that I do not regard the latter as of any special significance.

The right of telephone companies to use the city streets has been

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conferred by direct grant to the telephone companies themselves, with power in the municipal authorities to agree upon the mode of use only, but without authority to demand or receive any compensation for the use of the street beyond what may be necessary to restore the pavement to its former state of usefulness. And under such restricted powers the municipal authorities cannot enforce an agreement made by ordinance, accepted by the telephone company, granting permission to use the streets of the city upon condition that the company charge its subscribers not to exceed a certain price for its telephone service. *Farmer v. Telephone Co.* 72 Ohio St. 526 [74 N. E. Rep. 1078].

It will be noticed, however, that the grant to street railway companies in Sec. 3437 Rev. Stat. is not as clear as the grant to telephone companies in Sec. 3454 Rev. Stat., and also, that the powers of municipal corporations as to street railways are much greater in Sec. 2501 (Lan. 3763, 3767; B. 1536-183, 1536-184) Rev. Stat. than the powers of municipal corporations as to telephone companies in Sec. 3461 Rev. Stat.

Demurrer overruled.

ERROR—INTOXICATING LIQUORS—PARTIES—TIME.

[Perry Common Pleas, December 8, 1908.]

PERRY COUNTY, BY T. O. CROSSEN, PROS. ATTY. v. THOMAS J. TRACY.

1. PROSECUTING ATTORNEY MAY BRING PROCEEDING IN ERROR TO REVIEW DECISION OF PROBATE JUDGE IN ROSE COUNTY LOCAL OPTION LAW ELECTION CONTEST.

Section 9 of Act 99 O. L. 35, the Rose county local option law, makes it the duty of the county prosecutor upon summons of the probate judge to appear and defend a special proceeding to contest an election held under this act regardless of whether the county voted was voted wet or dry. Hence, having appeared on behalf of the county in the proceeding before the probate judge, the prosecutor has the right to continue its defense by filing a petition in error to the common pleas under Sec. 6708 Rev. Stat.

2. LAST DAY INCLUDED AND FIRST DAY EXCLUDED SUFFICIENT.

Section 4951 Rev. Stat. controls in the computation of time intervening between filing a petition for, and holding an election under, act 99 O. L. 35, for county local option, and it is sufficient that the first day be excluded; the last day, therefore, is properly included.

[Syllabus approved by the court.]

MOTION and demurrer.

J. E. Powell, J. W. Dugan, Spencer & Donahue, T. O. Crossen, W. B. Wheeler, for plaintiff in error.

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H. D. Cochran, T. M. Potter and John Ferguson, for defendant in error.

WOOD, J.

The record shows that on October 2, 1908, an election was held in Perry county, Ohio, under the county local option act (99 O. L. 35).

On October 10, 1908, the defendant in error contested the validity of the election by filing a petition with the probate court of that county, setting forth the grounds of contest as follows:

"For the reason that said petition was filed and also presented to said judge after two o'clock in the afternoon of September 12, 1908, and said order for said election was made on the evening of said day at or after the hour of seven o'clock, and twenty days did not expire until after the hour of two o'clock in the afternoon of said second day of October, A. D., 1908, the day upon which said election was ordered as aforesaid, and the day upon which it was held as aforesaid."

"For the reason that under said act said election should have been held not less than twenty nor more than thirty days from the filing and presentation of said petition to said common pleas judge, and said twenty days did not expire until after two o'clock in the afternoon of the day upon which said election was commenced, at five o'clock and thirty minutes in the forenoon."

"That said act is unconstitutional and void."

The probate judge issued a summons addressed to the county prosecutor, notifying him of the filing of the petition and directing him to appear in said court on behalf of said county at the time named in the summons.

The prosecuting attorney, for said county, appeared and filed a demurrer to the petition on the ground that the facts stated were insufficient in law.

This demurrer was sustained as to the third ground of contest and overruled as to the first and second grounds of contest, to which ruling in overruling said demurrer the prosecuting attorney excepted.

Upon the evidence adduced, the court found that said election was illegal and void and adjudged the same to be set aside and held for naught, to which the prosecuting attorney excepted.

A petition in error has been filed in this court by "Perry county, Ohio, by Tom O. Crossen, prosecuting attorney, on behalf of Perry county, Ohio, plaintiff in error," against "Thomas J. Tracy, defendant in error," to reverse the findings and judgment of the probate court.

To this petition the following motion has been interposed:

"Now comes the said Thomas J. Tracy, defendant in error, so named and characterized in the paper filed herein, and called a petition in error, for the purposes of this motion only, and for no other.

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and hereby specially limits his appearance to this motion and its purposes and moves the court here to dismiss said pretended petition in error for the following reasons, to wit:

"First: That said alleged pretended plaintiff in error has not legal capacity to sue.

"Second: That said alleged pretended plaintiff in error has no legal capacity to commence or prosecute this alleged proceeding in error.

"Third: That said alleged pretended plaintiff in error was not a party to the proceeding in the probate court and was incapable of being a party in that court and is incapable of being made a party in this court."

The three grounds of this motion are so dependent upon each other, they will be considered together.

In *Summers v. Hamilton Co.* 5 Dec. 553 (7 N. P. 542), and *Hunter v. Mercer Co.* (Comrs.) 10 Ohio St. 515, our courts have held that without statutory authority a county as such has no legal capacity to sue or be sued. These were civil actions and the law was correctly stated.

An election contest under the county local option act is not an action as recognized by the civil code, but a special proceeding, *Missionary Soc. of M. E. Church v. Ely*, 56 Ohio St. 405, 407 [47 N. E. Rep. 537], and the question is: Has the county in this special proceeding been authorized to defend the validity of its election.

Section 9 of the act reads:

"Any person being a qualified elector of the county wherein an election shall have been held as provided for in this act, may contest the validity of such election by filing a petition duly verified with the probate court of the county within ten days after the election, setting forth the grounds for contest.

"The probate judge upon the filing of such petition shall forthwith issue a summons addressed to the county prosecutor notifying him of the filing of such petition and directing him to appear in said court on behalf of said county at the time named in the summons, which time shall not be more than twenty days after the election nor less than five days after the filing of such petition. Any qualified elector in such county may in person or by attorney appear in such contested election case in defense of the validity of the election."

If under this section the county cannot defend, then only an elector can, and if he does not appear without notice, and make defense, then any election might be set aside upon the petition and evidence of the contestor alone, and a new election called every twenty days at the expense of the county.

I think the evident intent of the legislature was to place a re-

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sponsibility upon the county to defend the validity of its election, while permission is also given to any elector who might know of the contest to appear by himself or counsel, and take part in the defense.

By necessary implication I think the county is authorized to appear by its attorney for the single purpose of defending the validity of its election, regardless as to whether the election was in favor of, or against, county local option.

After being duly summoned the county prosecutor did appear and make defense and while the record does not disclose in words that he appeared on behalf of the county, yet under the provisions of the act the county's interest was the only interest he could defend in his official capacity. I conclude that he defended as an attorney for and on behalf of Perry county.

Having determined that the county was authorized to, and did, defend in this case in the probate court, the remaining question is, has the county a right to continue its defense by filing a petition in error in this court. This question is settled by Sec. 6708 Rev. Stat., which provides that a judgment rendered or a final order made by a probate court may be reversed, vacated or modified by the court of common pleas.

So I find that Perry county by its county prosecutor is authorized to file its petition in error in this case. Therefore, the motion of the defendant in error is overruled.

It is agreed by the parties that should the court overrule the motion it should next pass upon the general demurrer to the petition in error. A single question is raised by the demurrer: Did the time required by law intervene between the order made by the common pleas judge and the day upon which the election was held? If not, the election was void. That part of Sec. 1 of the act which relates to the time of holding an election reads as follows:

"That whenever 35 per cent of the qualified electors of any county shall petition the commissioners or any common pleas judge of such county for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such county, such commissioners or common pleas judge shall order a special election to be held in not less than twenty nor more than thirty days from the filing of such petition with the commissioners or common pleas judge or from the presentation of such petition to said commissioners or common pleas judge."

The petition was filed and presented to the common pleas judge on the twelfth day of September and the election was ordered and held on October 2, 1908.

The law does not regard fractions of a day, and it is immaterial

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whether the order was made in the first or last hour of the day of September 12.

The contention of the defendant in error is that there must have been twenty full or *clear* days between the day of the order and the day of the election. That is, the day of the order and the day of the election must be excluded in the computation of twenty days, while plaintiff in error claims the day of election should be included in the computation.

The time within which an act is required by law to be done has always been a question for legal controversy, and the decisions of courts of last resort both in this country and England have been so various that no difference for what ruling parties may contend, their positions can be supported by a respectable line of authorities.

Ohio and a number of other states have undertaken to relieve this uncertainty by enacting a law in harmony with most of the modern decisions.

Section 4951 Rev. Stat., provides:

"Unless otherwise specially provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last; and if the last be Sunday, it shall be excluded."

If the time of twenty days from the day (September 12) the election was ordered to the day of the election (October 2) is computed by this rule, then the election was legally held.

But it is contended that by the wording of the act which provides that the election shall be held in not less than twenty days from the presentation of the petition the case is brought within the exception. That is, mode of computing time here is "otherwise specially provided."

In commenting upon this statute our Supreme Court in a recent case, *State v. Elson*, 77 Ohio St. 489 [83 N. E. Rep. 904; 15 L. R. A. (N. S.) 686], says:

"In our opinion this rule of the statute should be followed and applied in the interpretation and construction of all statutes, save those where the language of the provision as to time itself clearly forbids it."

To take this case out of the ordinary rule, the court must find that the computation of time is "otherwise specifically provided" by the act itself, and that it clearly forbids that the rule of the statute should be followed.

If the act is clear and specific, it is a sad commentary upon the many eminent lawyers and judges who have so ably disagreed in their interpretation of similar statutes.

Were this a new question and two elections were ordered to be held, the one in ten days and the other in not less than ten days from

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the day of a certain act, my judgment would be that by the ordinary meaning of language one could be held just as soon as the other, and after an examination of many cases I feel sure the current of modern authority sustains this view.

In *Stebbins v. Anthony*, 5 Col. 348, the court says:

"The general current of modern authority is that where a statute requires an act to be performed a certain number of days prior to a day named, or a definite period after a day specified, or where the time is to be computed either prior or subsequent to a day named, the usual rule is to exclude one day of the designated period and to include the other."

This is not direct authority where the time designated is "in not less than" so many days, but in 28 Am. & Eng. Enc. Law (2 ed.) 220, we find this in the text of the author:

"A much vexed question is whether the addition of the phrase 'at least' or 'not less than' demands clear or entire days. For if such should be the case, as is seen above, both the *termini* must be excluded. On principle it would seem that three days means the same as at least three days, and it is held in most jurisdictions in the United States that where the words 'at least' or 'not less than' is added, the *terminus a quo* will be excluded and the *terminus ad quem* included, in accordance with the usual rule."

About forty cases are cited by the author in support of the text.

In a recent case of *Brady v. Moulton*, 61 Minn. 185 [63 N. W. Rep. 489], where an act provided that not less than ten days' notice of the special election should be given by publishing the same in a newspaper. *Held*:

"That in the computation of time the day of publication should be excluded and the day of election included."

The court is cited to the Lord Tenderdon's test, that is, reduce the time to one day and construe the statute as though it read that the election should not be held in less than one day from the presentation of the petition, from which it is argued the election could not be held on the following day, but the rule is not supported by later decisions of the courts of this country unless it be the state of Kentucky. When the rule had force in England there was no uniform rule for the computing of time and it was not computed as it is almost universally in this country to-day, that is, by excluding the first and including the last day.

1 Sutherland, Stat. Constr. Sec. 112, gives the modern rule of computation:

"The rule is so generally recognized to exclude the first, or *terminus a quo*, and to include the last, or *terminus ad quem*, that it requires no particular words for its application. The *terminus a quo*,

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so far as it is descriptive of a period of time, is coincident with the day, or day of the act from which the computation is to be made; that day is indivisible; the period to be computed is another and subsequent period, which begins when the first period is completed. The last day of that period is an indivisible point of time—the *terminus ad quem*. When that point is reached the period is complete.”

By this rule Lord Tenderdon’s test would fail just as it would under the statute, and the election would be legal on the day following the presentation of the petition. It is the extreme case presented which gives an apparent absurdity to the rule, but it does not change nor affect its legality.

In my aim to reach a correct conclusion in this case, and one which would be sustained by the higher courts, which I have presumed would have an opportunity to review my judgment, I have been greatly aided by elaborate briefs from counsel upon either side, showing both thorough research and able discrimination in their presentation of cases.

I am of the opinion that the demurrer should also be sustained.

An entry may be drawn in accord with the conclusions reached, saving all rights to the defendant in error to which he is entitled.

ELECTRICITY—NEGLIGENCE—TRESPASSERS.

[Lorain Common Pleas, March 21, 1908.]

HELEN SMITH, ADMRX. V. CLEVELAND & S. W. TRACTION CO.

ELECTRIC RAILWAY COMPANY MAINTAINING HIGH TENSION WIRE OVER LANDS OF ANOTHER AT PLACE WHERE CHILDREN CONGREGATED TO PLAY, OWES DUTY TO SAID CHILDREN. CHILDREN NOT TRESPASSERS AS AGAINST COMPANY.

A traction company maintained a high tension wire over the lands of another at a point where children were in the habit of congregating for play without objection from the landowner; said wire was down within a few feet from the ground for some time and a nine-year-old boy playing in that vicinity came in contact with the wire and was instantly killed. *Held:*

- (1) That said boy was not a trespasser or even a bare licensee as against said traction company which had the right only to build its pole line and maintain its wire in the air on said poles, and,
- (2) That if said company knew, or by the exercise of ordinary care should have known, that children were in the habit of congregating at that point for play and should reasonably have anticipated that they might come in contact with said wire and be injured if the same was near the ground, then the company owed to such children a duty greater than merely not to willfully or wantonly imperil their safety. The company not being the owner of the land and the children not being trespassers, the former owed the latter the duty of using ordinary care in maintaining its wire a proper distance from the ground and is liable for a failure to discharge that duty.

[Syllabus by the court.]

DEMURRER.

Smith v. Traction Co.

F. M. Stevens and Johnston & Hammond, for plaintiff.

E. G. & H. C. Johnson, for defendant.

WASHBURN, J.

This matter is before the court on a demurrer to the second amended petition. Among other things, the second amended petition sets forth that the defendant was a corporation organized and doing business under the laws of Ohio, and that it owned and operated an electric railway and in connection with the operation of said railway it owned, operated, maintained and used a certain line of high tension wires around and through the outskirts of the village of Oberlin, Lorain county, Ohio, for the purpose of carrying a high tension current of electric power, and that by reason of the strong and dangerous current of electricity carried on the said high tension line the said wires were extremely dangerous to the life of any person coming in contact therewith. That said line was constructed, maintained and operated through and across the premises of one B. H. Cherry, which said premises were located within the corporate limits of the village of Oberlin, and that the defendant had only the right to set its poles and string its wires in the air on said poles across the said premises of said Cherry, and that said Cherry had the right to all the other uses of the real estate beneath the high tension line and adjoining it. That south of said line and near where it crossed said Cherry's land there was located a certain athletic ground of Oberlin College, and that north of said line and on the property of said Cherry there was a pond known as Cherry's pond. That said line was located about midway between said athletic ground and said pond. That at said points children were in the habit of congregating for play. That the defendant knew of the location of said ground and said pond and of the use made thereof by said children, or by the exercise of ordinary care might have known of the same, and that the defendant knew, or by the exercise of ordinary care, might have known that children congregated at said points for play and passed and repassed under said pole line in going from said athletic ground to said pond upon said Cherry's land, with full knowledge and permission of said B. M. Cherry. That between said points the defendant permitted its high tension wire to sag down within a few feet of the ground, and that said wire had been in such condition for some time. That the defendant knew, or by the exercise of ordinary care might have known, of its condition. That said wire was uninsulated and was in said condition close to the ground because of the insufficient and improper manner in which said pole line was constructed. That on September 30, 1906, and while said wire was in said condition, plaintiff's decedent, a boy nine years of age, together with other children, was on his way to the aforesaid pond, and in order to reach it passed beneath the wire of said high tension line at the point

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where the same hung near the ground, and that the wire of the said high tension line came in contact with his body, causing him to receive an electric shock resulting in his death, all without any fault or negligence on his part. That he had no means of knowing and did not appreciate the danger of coming into contact with said wires, and that his death was due solely to the gross negligence and carelessness of the defendant, in that said pole line was improperly constructed, and that said wires were not properly insulated, and that it permitted the same to sag down close to the ground and remain in that condition, without having any danger signal or sign displayed at said point, and that the defendant knew or was charged with knowledge of the condition of said wires. The petition also sets forth the names of decedent's father and mother and next of kin.

The defendant, in presenting the matter to the court, relied upon but one contention, and that is, that the petition does not state facts sufficient to constitute a cause of action, because the defendant did not owe any duty to plaintiff's decedent. It is said in argument that plaintiff's decedent was a trespasser, or at best a bare licensee, upon the premises of said B. M. Cherry, and that the defendant owed him no duty except that of not wilfully or wantonly imperiling his safety, and there being no claim that the defendant wilfully or wantonly injured him, therefore, in this case the defendant owed plaintiff's decedent no duty whatever.

It might be conceded, I think, since the decision of our Supreme Court in the case of *Wheeling & L. E. Ry. v. Harvey*, 77 Ohio St. 235 [83 N. E. Rep. 66; 122 Am. St. Rep. 503], that had said pole line been maintained just as it was by the owner of said land, said B. M. Cherry, he would not have owed plaintiff's decedent any duty in the premises for the violation of which he would have been liable in damages. It is true that the petition states that plaintiff's decedent was there with the full knowledge and permission of said Cherry, but it is not claimed that there was any actual permission granted plaintiff's decedent, and what is really meant by that allegation is that said Cherry suffered the children to come upon his premises and play.

So that with that understanding of the petition it must be conceded, I say, that under the authority of the cases above referred to, Mr. Cherry would not be liable to plaintiff's decedent if he had owned and operated said pole line upon his own premises.

The question is, is the duty of the defendant, who merely had a right to maintain its pole line and wires across the premises of Mr. Cherry, to be measured by the same standard as the duty of the landowner, Mr. Cherry. Does the fact that plaintiff's decedent was a trespasser against, or a bare licensee of, Mr. Cherry, make him also a trespasser against the defendant?

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From the best light I can find upon the subject I do not think that plaintiff's decedent can be considered as a trespasser as against the defendant in this case. As against the defendant he had a lawful right to pass under the wire of the defendant. The defendant, according to the petition, had the bare right of building its pole line and maintaining its wire in the air on said poles. It did not own the land or any right therein, and therefore could not grant to, nor withhold from, plaintiff's decedent the right to pass under its wire on the premises of Mr. Cherry. If plaintiff's decedent had interfered with the pole and wire in place, he might have been a trespasser as against the defendant, but he would not be a trespasser upon the defendant's rights if he came in contact with the wire elsewhere. He did not interfere with the defendant's pole, neither did he come in contact with the wire in the place where the defendant had a right to maintain it.

It seems to me, therefore, that defendant's duty to plaintiff's decedent is not to be measured by the same standard as that of a landowner upon whose premises a trespass is committed. The defendant was maintaining a high tension wire charged with a deadly current of electricity and was charged with a high degree of care as to all persons who were lawfully in a place of proximity to the wire. Its duty was governed by the general rule that a person is liable for those results of his own negligence which are reasonably to be anticipated. Had it been the owner of the land, it would have been exempted from liability as to trespassers and bare licensees, because that exemption is necessary to secure to the landowner the beneficial use of his land, but why should the exemption be extended to a case where the rights of the defendant have not been interfered with?

If the defendant had been in the exclusive use and occupancy of the land, that would present a situation where it would have the right to grant or withhold permission to cross the same and to control the use thereof, and it would entitle it to claim the exemption of a landowner; but the exemption of the landowner is in the nature of an exception to the general rule that a person is liable for the results of his negligence which are reasonably to be anticipated, and I don't think that the exemption should be extended to a company which is conducting a dangerous current of electricity over property not owned by it and in which it has no interest or right, except the right to set its poles and maintain its wires thereon. If such a company maintains such a line in a place where children are in the habit of congregating for play, it ought not to be relieved from liability for its negligence merely because the children are trespassers or mere licensees as against the owner of the land.

If the defendant's dangerous wire was down within a few feet of the ground at a point between said athletic ground and said pond,

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and the defendant knew that fact, or by the exercise of ordinary care might have known that it was down, and the defendant knew, or by the exercise of ordinary care might have known, that children were in the habit of congregating at said points for play and passing from one point to the other under its wire, without objection from the landowner, Mr. Cherry, and if the defendant might reasonably have anticipated that the children so in said vicinity might come in contact with said wire and be injured, then I think that the defendant owed a duty to plaintiff's decedent.

I am of the opinion that the petition states facts which, if true, legally bound the defendant to safeguard against occurrences that could be reasonably anticipated or contemplated as likely to occur. This matter being new, so far as I know, in Ohio, I have made a reasonably diligent search for cases in point, and while I have found one case which if the principle there laid down was followed would perhaps exempt the defendant from liability, I have found two cases which are fairly in point and which, if followed, would make the defendant liable, and I have found the same rule stated in quite a number of cases where the facts were somewhat similar to the case at bar.

The case which exempted the defendant from liability on the ground that the party injured was a trespasser or bare licensee as against the owner of the property, is found reported in *Cumberland Tel. & Tel. Co. v. Martin*, 116 Ky. 554 [76 S. W. Rep. 394; 63 L. R. A. 469; 105 Am. St. Rep. 229]; being a case decided by the Kentucky court of appeals. That was a case where a telephone company in furnishing service to a store had negligently constructed its line so that a connection was formed with certain iron gratings over a window under the porch of the store, and the young man who was killed, in company with some other boys, took refuge from the rain under the porch of said building and sat upon a box with his back against the grating over the window. Lightning struck one of the telephone poles and was conducted by the wire to the porch and passed on to the iron roof and from the iron roof to the grating and thence through the body of the deceased to the ground, killing him instantly. The court in disposing of the case used this language:

"If it be conceded that the deceased was not technically a trespasser, but a licensee, still he was a bare licensee. He had no business at the store. He went under the porch to get out of the rain and remained there entirely for his own convenience. The owner of the property was under no liability to him to keep it safe. If the telephone company had owned both the building and the wire, it would not have been under any responsibility to the deceased for his injury, although he was under its porch by its implied consent, as he was there as a bare licensee, for his own convenience. If the telephone company

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would not be responsible if it owned both the wire and the building, it is certainly under no greater responsibility when it owned only the wire. If it had put its own wire negligently on its own building, and thus endangered its being struck by lightning, it would be responsible to those it invited to the building in a dangerous condition, but it would not be responsible to those merely using it for their own convenience as a shelter in a time of storm. When it put its wire negligently on another person's building, and was negligent in securing it, it violated its duty to him, but it violated no duty to those to whom neither he nor it were under any obligation. We therefore conclude, for the reasons stated, that plaintiff made out no cause of action against appellant."

It will be noticed that the defendant in this case was not engaged in the business of manufacturing and transmitting over said wire an exceptionally dangerous current of electricity. No wire carrying such a deadly current was in the vicinity. To cause the decedent's death there was an intervention of an act of God, which alone rendered the situation dangerous. It seems to me that the same result could have been reached in this case by holding that the company was not relieved from liability because the decedent was a bare licensee, but that the company was not liable because its duty to the decedent was to provide against injuries to him which might reasonably have been anticipated, and that considering the fact that the wire was not constructed for the purpose of carrying a deadly current and the defendant was not engaged in the business of dealing with a deadly current and no wires charged with such a current were in the vicinity, and considering also the source of the deadly current, the defendant ought not under all the circumstances of the case, to have reasonably anticipated that injury to persons upon said porch was likely to occur from the negligent manner in which its wires were connected with said building. At least, in my judgment, the defendant ought not to have been relieved from liability merely because the injured party was, as to the landowners, a bare licensee, for as against the defendant he had a perfect right to be where he was and he did not violate the rights of the defendant in any particular whatever.

It seems to me that the better rule is laid down in the two cases to which I shall now refer. In these cases the defendants were engaged in handling a very deadly current of electricity which required a very high degree of care for the protection of the public generally, and especially of all those who were, as against the defendants, lawfully in the vicinity of the wires carrying the same.

In *Connell v. Electric Ry. & Power Co.* 131 Iowa 622 [109 N. W. Rep. 177], the facts were that the scene of the accident was an uninclosed and unimproved tract of rough land covered with trees, brush

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and weeds, belonging to one Hubinger. Over this property the defendant was maintaining its electric light and power wires, supported on poles, the wires being in general insulated. Deceased, a boy of fourteen years of age, with two companions a few years older, went upon this uninclosed and unimproved property of Hubinger to get some zinc which had been thrown away, in order that they might sell it for junk. Deceased in some way came in contact with defendant's wire where it had been allowed to sag and where the insulation had been worn off, apparently by contact with a tree, and was accidentally killed by the shock. The Supreme Court in disposing of the case laid down the law in the syllabus as follows:

"Though plaintiff's intestate was a bare licensee or trespasser on the land of H, when he was killed by coming in contact with defendant's electric wire extending across such land, where it had been allowed to sag and where the insulation was worn off, defendant is liable, having known of the dangerous condition of the wire, and that persons were in the habit of going near the place of danger."

A verdict for plaintiff was sustained in the case, notwithstanding the fact that the jury found in answer to questions, that the plaintiff's decedent did not have the consent of the owner or occupier of said land to go upon the same, that at the time he was upon said premises he had no right to be there, that at the time and prior thereto the owner of the land forbade persons from entering upon the land where the injury occurred, that the place where the injury occurred was private and that the plaintiff was not invited to go upon said land at the place where said injury occurred at the time of the same.

There is another case, *Guinn v. Telephone Co.* 72 N. J. L. 276 [32 Atl. Rep. 412; 3 L. R. A. (N. S.) 988; 111 Am. St. Rep. 668], which is squarely in point. In that case William C. Guinn, a lad thirteen years of age, was killed by contact with a guy wire charged with electricity. The wire was one of the character used for telephone construction, copper wire of a tensile strength of 250 pounds. It was attached to a pole on which were strung wires of the defendant alone. "The injury was caused by the guy wire breaking and falling on an electric light wire belonging to another company. The broken wire fell in the grass in a field belonging to Grulick. Across this field people were accustomed to travel without objection, but, as far as appears, without other right. The boy's body was found still in contact with the guy wire shortly after the shock. It does not appear that he had any right to be on Gulick's property, except such as may be inferred from the facts stated. The contention of the defendant is that it was under no duty to the decedent for the reason that he was a trespasser on Gulick's property or at best a mere licensee." The court held in that case, "that the telephone company was under a duty to the de-

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cedent to exercise care, even if he was a trespasser as between himself and the landowner," and the court, after observing that the liability of the defendant rested upon the fact that it was maintaining wires which might become charged with a deadly current of electricity and stating that the duty to exercise care is established as to travelers upon the highway and employes of the defendant or of another company who, in the exercise of their rights, are likely to come in contact with the wires and as to all persons who were lawfully in a place of proximity to such wires, then says:

"The question presented in this case is whether the duty exists also as to third persons who are not at the time in the exercise of any legal right. * * * In the present case, the guy wire was stretched over an open field across which people were accustomed to travel without objection by the landowner. The adjoining field was used as a ball ground. It was probable that, if the guy wire broke, some one crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee, as against the landowner, cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong, nor a wrong to the defendant. The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may, in fact, reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. It is these considerations which led this court to deny the liability of the defendant in the turntable cases. * * * The general rule is that a person is liable for those results of his negligence which are reasonably to be anticipated, the exemption of the landowner from liability as to trespassers and licensee is necessary to secure him the beneficial use of his land; but no reason exists for extending this exemption to a case where the rights of the defendant have not been interfered with. * * * The deceased is not shown to have interfered with the defendant's rights. The right to maintain the pole and wire did not involve the right to have the wire swing loose or occupy another portion of the field."

In the case at bar, as shown by the second amended petition, said high tension wire was down at a point where said line turned at right angles, and it is alleged that the corner pole burned in two near the top by reason of electricity passing through a guy wire attached near the top of said pole, and the high tension wire was thus permitted to sag down and form the hypotenuse of a right-angled triangle, and was, as alleged in the petition "some distance away from the aforesaid corner pole and from the right of way of the said high tension line of defendant." So that it fairly appears that the defendant, in main-

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taining said wire where it was at the time plaintiff's decedent was killed, was at best a bare licensee itself, and if that is so it could not complain that the plaintiff's decedent was also a bare licensee.

At the risk of unduly extending this opinion I might add that if the defendant company had obtained from the landowner a right to maintain its high tension wire across his land upon poles extending but four feet from the ground and did so build and maintain such wires carrying such deadly current of electricity, it would almost shock one's sense of justice to permit the defendant under such circumstances where it had the bare right of maintaining its wire so close to the ground and had no other interest in the real estate, to claim that it owed no duty to children who, without objection from the landowner, were passing on said real estate of said owner under said high tension wire.

In view of one of the charges of negligence in this petition, that was practically what the defendant was doing, for it is charged that its wires were down close to the ground for such a length of time as that the defendant by the exercise of ordinary care should have known it was there, and if it actually knew it was there, or in law should have known it was there, then it was, in effect, maintaining it there, and one who so maintains such a deadly wire upon the property of another, having no interest in that property except the right to so maintain its wire, must in all fairness and justice be charged with some duty to children who come upon said premises by the mere sufferance of the owner.

The demurrer will be overruled.

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CONSTITUTIONAL LAW—INJUNCTION—INTOXICATING LIQUORS.

[Hancock Common Pleas, 1908.]

JACOB GASSMAN v. ARTHUR E. KERNS ET AL.*1. RIGHT TO TRAFFIC IN INTOXICATING LIQUORS NOT INHERENT.**

The right to traffic in intoxicating liquors not being an inherent right, act 99 O. L. 35, commonly called the Rose county local option law, in that it prohibits such traffic within county limits after an election against the sale, is not unconstitutional as violating the principle of the inviolability of private contracts, or denying the constitutional liberties of the subject of government.

2. ROSE LAW HELD CONSTITUTIONAL.

Act 99 O. L. 35, in that its operation is submitted to vote of the electors of any county, is not unconstitutional as being a delegation of legislative power to any other authority than the general assembly; nor is it unconstitutional because it is a general law without uniform operation.

3. ENFORCEMENT OF PROHIBITORY PROVISIONS OF ROSE LAW NOT ENJOINABLE.

Injunction does not lie to test the validity of an act which provides a penalty for its own violation. Hence, an adequate remedy at law being afforded in a criminal prosecution under the act, 99 O. L. 35, for the violation of its provisions, injunction will not lie to prevent enforcement of the act.

4. PRIVATE CITIZENS AS PARTIES TO CONSTITUTIONAL TEST PROCEEDINGS.

Private citizens acting in no official capacity, though members of an organization whose objective is the enforcement of the provisions of act 99 O. L. 35, are not proper parties to a proceeding to restrain its enforcement, or test its constitutionality.

[Syllabus approved by the court.]

DEMURRER to petition.

G. H. Phelps, for plaintiff:

Cited and commented upon the following authorities: 1 Pomeroy, *Eq. Jurisp.* Sec. 3; *State v. Garver*, 66 Ohio St. 555 [64 N. E. Rep. 573]; *State v. Yates*, 66 Ohio St. 546 [64 N. E. Rep. 570].

W. B. Wheeler, W. L. David, Charles Blackford and A. G. Fuller, for defendants.

Cited and commented upon the following authorities: *Schmidt v. Brennan*, 16 Dec. 623 (4 N. S. 239); *Poyer v. Des Plaines (Vl.)*, 123 Ill. 111 [13 N. E. Rep. 819; 5 Am. St. Rep. 494]; *Burnett v. Craig*, 30 Ala. 135 [68 Am. Dec. 115]; *Davis v. American Society*, 75 N. Y. 362; *Cavanaugh v. Cleveland (City)*, 8 Dec. 329 (6 N. P. 423); *Gordon v. State*, 46 Ohio St. 607 [23 N. E. Rep. 63; 6 L. R. A. 749]; *Stevens v. State*, 61 Ohio St. 597 [56 N. E. Rep. 478]; *Stevens v. State*, 10 O. F.

*Affirmed by circuit court, December 16, 1908.

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D. 81 [179 U. S. 680; 21 Sup. Ct. Rep. 917; 93 Fed. Rep. 793; 45 L. Ed. 384]; *State v. Dollison*, 68 Ohio St. 688 [70 N. E. Rep. 1131]; *Lloyd v. Dollisin*, 13-23 O. C. C. 571 (3 N. S. 328); *State v. Dollison*, 14 O. F. D. 380 [194 U. S. 445; 24 Sup. Ct. Rep. 703; 48 L. Ed. 1062]; *Carey v. State*, 70 Ohio St. 121 [70 N. E. Rep. 955]; *Jeffrey v. State*, 72 Ohio St. 647 [76 N. E. Rep. 1126]; *Jeffrey v. State*, 26 O. C. C. 591 (4 N. S. 494); *Columbus v. Jeffrey*, 14 Dec. 609 (2 N. S. 85); *Doering v. Cincinnati*, 76 Ohio St. 636 [81 N. E. Rep. 1184]; *Boston Beer Co. v. Commonwealth*, 97 U. S. 25 [24 L. Ed. 989]; *State v. Aiken*, 42 S. C. 222 [20 S. E. Rep. 221; 26 L. R. A. 345]; *State v. Bixman*, 162 Mo. 1 [62 S. W. Rep. 828]; *Beebe v. State*, 6 Ind. 501; *State v. Crawford*, 28 Kans. 726 [42 Am. Rep. 182]; *Schwuchow v. Chicago*, 68 Ills. 444; *Thurlow v. Commonwealth*, 46 U. S. (5 How.) 504 [12 L. Ed. 256]; *State v. Durein*, 70 Kan. 13 [80 Pac. Rep. 987]; *Santo v. State*, 2 Iowa 165 [63 Am. Dec. 487]; *Adler v. Whitbeck*, 44 Ohio St. 539 [9 N. E. Rep. 672]; *Vance v. Vandercook Co.* 170 U. S. 438 [18 Sup. Ct. Rep. 674; 42 L. Ed. 1100]; *Baxter v. State*, 89 Pac. Rep. 369 (Ore.); *Fields, Ex parte*, 39 Tex. Crim. Rep. 50 [46 S. W. Rep. 1127]; *Hancock v. Bingham*, 31 Ky. L. Rep. 427 [102 S. W. Rep. 341]; *Crowley v. Christensen*, 137 U. S. 86 [11 Sup. Ct. Rep. 13; 34 L. Ed. 620]; *Bartlemeyer v. Iowa*, 85 U. S. (18 Wall.) 129 [21 L. Ed. 929]; *Giozza v. Tiernan*, 148 U. S. 657 [13 Sup. Ct. Rep. 721; 37 L. Ed. 599]; *Butchers' Benevolent Assn. v. Live-Stock Land. & Slaughter-House Co.* 83 U. S. (16 Wall.) 36 [21 L. Ed. 394]; *Cronin v. Adams*, 192 U. S. 108 [24 Sup. Ct. Rep. 219; 48 L. Ed. 365]; *Rippey v. Texas*, 193 U. S. 504 [24 Sup. Ct. Rep. 516; 48 L. Ed. 767]; *Field v. Clark*, 143 U. S. 649 [12 Sup. Ct. Rep. 495; 36 L. Ed. 294]; *Weaver v. Cherry*, 8 Ohio St. 564; *State v. Parker*, 26 Vt. 357; *State v. Messenger*, 63 Ohio St. 398 [59 N. E. Rep. 105].

DUNCAN, J.

This suit is brought by the plaintiff, a retail dealer of intoxicating liquors in this city, seeking to test the constitutionality of what is known as the Rose county local option law whereby, on a majority vote of the electors of any county, the sale of intoxicating liquors therein, as a beverage, may be prohibited for the term of three years. The petition recites that one Arthur E. Kerns and one Theodore Bayless, the sole defendants herein, with others, styling themselves as "The Hancock County Local Option League," sought to avail themselves of the provisions of said law and circulated petitions in pursuance of which an election was held in this county on November 16, 1908, resulting in a dry victory, and that, under the provisions of said law, if it is constitutional the plaintiff's said business will become unlawful on and after December 16, 1908. The petition further recites that the defendants

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and other members of said organization threaten and intend, and will unless restrained therefrom, attempt to force the plaintiff into obedience of said law and cause him to be prosecuted if he does not submit.

The objections made to said law are as follows:

1. That it violates the constitutional liberties of the subject of government under both the constitution of Ohio and the constitution of the United States.

2. That it violates the principle of the inviolability of private property.

3. That it violates that provision of the constitution of Ohio which delegates to the general assembly all that legislative power as is not by the terms of the constitution reserved to the people.

4. That it violates Par. 1 of Sec. 26, Art. 2 of the constitution of Ohio requiring all laws of a general nature to have a uniform operation throughout the state.

5. That it violates the concluding paragraph of said last-named section, which provides that no act shall be passed or take effect upon the approval of any other authority than the general assembly.

The prayer is that said law be declared unconstitutional and void, and that defendants and all others acting with them be enjoined from interfering with him in the orderly conduct of his said business.

The defendants file a demurrer to this petition which raises the question whether the defendants Kerns and Bayless are proper parties defendants for the object sought, whether injunction is the proper remedy, and whether a cause of action otherwise is stated in the petition.

Are Kerns and Bayless proper parties defendants? Kerns and Bayless are private citizens. They are made defendants here in no official capacity in which a duty devolves upon them to enforce this or any other law. Hence, they can represent no one but themselves and any order made on them would bind no one else. The fact that they belong to an organization whose object is the enforcement of this law, means nothing in a legal sense. This organization does not represent the public, or any considerable part of it; so that, any decision of this case could bind no one but the parties to it. This being so, the result would fall far short of determining plaintiff's right to continue his business in this county. It follows, therefore, that said Kerns and Bayless are not proper defendants to this action, and being the only defendants, this action must fail for this, if for no other reason.

It is also to be observed that the wrong complained of is not confined to the plaintiff. No right or privilege peculiar to him is violated. The wrongs inflicted and rights invaded, if any, affect the public on one side, at least, and the questions must be raised in such way as that the public is represented and bound by the result.

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Is injunction the proper remedy?

It has been decided many times that it is not. The principle has long since become elementary that a court of equity will not enjoin criminal proceedings. Bispham, Equity (4 ed.) Sec. 412. This is upon the theory that there exists an adequate remedy at law. Where a court of law can do as full justice to the parties and to the matter in dispute as can be done in equity, a court of equity will not stay proceedings at law. The principle is well established, and is universal in its application, that when a cause belongs to the jurisdiction of the law courts, equity will never interfere to restrain the prosecution of the action. Pomeroy, Equity Secs. 1361 and 1361n. That is to say, it is time enough for plaintiff to test the law when he is actually attacked by the law. This is illustrated by a case decided by our own circuit court, *Arnold v. Van Wert* (Vil.), 2 Circ. Dec. 314 (3 R. 545), where it is held that,

"A court of equity will not interfere to restrain a municipal corporation, its mayor or marshal, from enforcing an ordinance prohibiting the sale of intoxicating liquors within the corporation, upon the ground of the illegality of such ordinance, until the right of the complainant is established at law."

This case was followed by Judge Dissette in *Cavanaugh v. Cleveland (City)*, 8 Dec. 329 (6 N. P. 423), where it is held that,

"An injunction will not be granted to restrain the officers from enforcing the law, on the mere theory that someone questions the validity of such law or ordinance."

See also, *Schmidt v. Brennan*, 16 Dec. 623 (4 N. S. 239). Such decisions are not peculiar to Ohio. The principle is universal and decisions may be found in many of the states directly in line. In Missouri it is held that,

"An injunction against the enforcement of a statute requiring the inspection of beer cannot be granted on the ground that the statute is unconstitutional, where the statute is enforceable only by criminal proceedings, since equity has no jurisdiction to enjoin criminal prosecutions."

"Setting up unconstitutionality of a statute in defense of a criminal information or indictment gives an adequate remedy at law against the statute, which will preclude the equitable relief, where it can be enforced only by such criminal proceedings." *State v. Wood*, 155 Mo. 425 [56 S. W. Rep. 474; 48 L. R. A. 596].

It is held in Georgia that,

"Courts of equity will not by injunction prevent the institution of prosecutions for criminal offenses, whether the same be violations of state statutes or municipal ordinances; nor will they, upon a petition for an injunction of this nature, inquire into the constitutionality of a

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legislative act, or the validity or reasonableness of an ordinance making penal the act or acts for the doing of which prosecutions are threatened." *Paulk v. Sycamore (City)*, 104 Ga. 24 [30 S. E. Rep. 417; 41 L. R. A. 772; 69 Am. St. Rep. 128].

See, also, the following authorities to the same effect: *Burnett v. Craig*, 30 Ala. 135 [68 Am. Dec. 115]; *Crighton v. Dahmer*, 70 Miss. 602 [13 So. Rep. 237; 21 L. R. A. 84; 35 Am. St. Rep. 666]; *Chrisholm v. Adams*, 71 Tex. 678 [10 S. W. Rep. 336]; *Portis v. Fall*, 34 Ark. 375; *Suess v. Noble*, 31 Fed. Rep. 855; *Wallack v. Society*, 67 N. Y. 23.

The court in this last case say:

"The unconstitutionality of the act of 1872 would be a perfect defense to a prosecution for the penalties given by it, and the question as to the constitutionality of the act has not been determined. It would, doubtless, be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not a ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage, rather than restrain, litigation." It is hardly necessary to say that this argument is strikingly applicable to the case at bar. See also, *Poyer v. Des Plaines (Vil.)*, 123 Ill. 111 [13 N. E. Rep. 819; 5 Am. St. Rep. 494]; *St. Peter's Episcopal Church v. Washington*, 109 N. C. 21 [13 S. E. Rep. 700]; *State v. O'Leary*, 155 Ind. 526 [58 N. E. Rep. 703; 52 L. R. A. 299], and other cases.

Is a cause of action stated in the petition, otherwise? This requires us to consider the constitutional objections made in the petition:

1. That it violates the constitutional liberties of the subject of government. This objection assumes that the traffic in intoxicating liquors is an inherent right of the citizen. The great weight of authority is to the contrary. In the case of *Crowley v. Christensen*, 137 U. S. 86 [11 Sup. Ct. Rep. 13; 34 L. Ed. 620], Justice Field, after dwelling upon the evils resulting from the sale of intoxicating liquors, says:

"It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors at retail; it is not a privilege of a citizen of the state or of a citizen of the United States."

In the latter cause of *Giozza v. Tiernan*, 148 U. S. 657 [13 Sup. Ct. Rep. 721; 37 L. Ed. 599], Chief Justice Fuller says:

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted and secured by the

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constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship." See also, *Bartemeyer v. Iowa*, 85 U. S. (18 Wall.) 129 [21 L. Ed. 929]. So, it is held by the supreme court of Kansas, *Kansas v. Durein*, 70 Kan. 1 [78 Pac. Rep. 152; 15 L. R. A. (N. S.) 908], that "the right to sell intoxicating liquors is not one of the privileges or immunities attaching to citizenship in the United States."

Judge McElvaine in *State v. Frame*, 39 Ohio St. 399, having under discussion the Scott law, says in his opinion at page 408:

"And further, without stopping to inquire into the inherent nature of legislative power, it is certainly safe to say, that in the absence of conventional limitations, the power would be ample for the making of laws absolutely prohibiting all traffic in intoxicating liquors. To maintain this doctrine it is not necessary to hold that the right to traffic generally, in all subjects of trade, is subject to legislative control. It is enough to hold that a traffic which tends to evil, and that continually, is under the absolute power of the general assembly."

Judge Minshall in his opinion, in *Adler v. Whitbeck*, 44 Ohio St. 539, 574 [9 N. E. Rep. 672], in discussing the "Dow" law, says:

"It is averred that, from a long time prior to the enactment of this law, the plaintiffs have been engaged in the traffic in intoxicating liquors, and have had a large amount of property invested in the business; and it is claimed that the law cannot be made applicable to them without impairing vested rights. The claim is not tenable. It would subvert the power to provide against the evils of the traffic, and place it superior to any regulation whatever. * * * No prescriptive right can be claimed by persons engaged in the whiskey traffic against the exercise of its functions by the legislature of the state."

Judge Minshall then quotes with approval from the opinion of Chief Justice Taney in *Thurlow v. Commonwealth*, 46 U. S. (5 How.) 504 [12 L. Ed. 256], as follows:

"If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

2. That it violates the principle of the inviolability of private property. This contention is disposed of in terms by the decision of our Supreme Court just referred to. On this point Judge Minshall further says:

"The provision of section 9, article 15 (section 18 of the schedule) of the constitution has stood, since its adoption, as a perpetual admonition to all persons engaging in the traffic, that, in doing so, they place their property, invested in the business, subject to the power of the

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general assembly to provide against evils resulting from the traffic. The same argument was made in *Miller v. State, supra*, against the act of 1854 prohibiting, among other things, the sale of liquor to be drunk on the premises where sold; but it met with no favor in the court. The law was held valid. See opinion of Thurman, J., in the case *Miller v. State*, 3 Ohio St. 475, 484, 487."

And it might be said that this same question was involved to a greater or less extent in every act of the legislature for more than half a century having in view the regulation or prohibition of the traffic or the place where it was carried on, and that the holding has always sustained the exercise of the power. I call attention to a few of the cases: *Burckholter v. McConnellsville (Vil.)*, 20 Ohio St. 308; *Bronson v. Oberlin*, 41 Ohio St. 476 [52 Am. Rep. 90]; *Theis v. State*, 54 Ohio St. 245 [43 N. E. Rep. 207]; *Gordon v. State*, 46 Ohio St. 607 [23 N. E. Rep. 63; 6 L. R. A. 749]; *Stevens v. State*, 61 Ohio St. 597 [56 N. E. Rep. 478]; *State v. Dollison*, 68 Ohio St. 688; affirming decision of lower court reported in *Lloyd v. Dollisin*, 13-23 O. C. C. 571 (3 N. S. 328); *Carey v. State*, 70 Ohio St. 121 [70 N. E. Rep. 955], and *Jeffrey v. State*, 72 Ohio St. 647; affirming decision of lower court reported in *Jeffrey v. State*, 26 O. C. C. 591 (4 N. S. 494). The conclusion is, therefore, that such legislation does not violate the inviolability of private property.

3. That it violates that provision of the constitution which delegates to the general assembly all such legislative power as is not by the terms of that instrument reserved to the people. This objection may be disposed of in connection with the fifth objection.

4. That it violates Par. 1 of Sec. 26, Art. 2 of the constitution of Ohio requiring all laws of a general nature to have a uniform operation throughout the state.

The act in question may be found in 99 O. L. 35. It provides that whenever 35 per cent of the qualified electors of any county shall petition, etc., for an election to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such county, etc., a special election shall be held, and if a majority of the votes cast at such election is against the sale of intoxicating liquor as a beverage, then the selling, furnishing or giving away of intoxicating liquors as a beverage in said county from and after the expiration of thirty days from such election is prohibited and unlawful, punishable by fine and imprisonment. The act comprises eleven sections the last one of which reads as follows: Sec. 11. "This act shall take effect and be in force on and after September 1, 1908." The act is general. It does not apply to one or more counties of the state but to all. It is for the benefit of any county whose electors may wish to take advantage of it. It is like the mechanic's lien law,

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the contractor or material man may take advantage of it if he has a case calling for it and so desires. The option which he has to proceed under it does not destroy its uniform operation. The same principle is seen in the provision of law which allows cities and villages and boards of education to exceed the regular tax limit by vote of the electors in such city, village or school district, or sets the law in motion which provides for the paving of a street upon petition of the abutting owners. The law is general, it is in effect, it is operative, but it is not automatic or self executing. We have it and can take advantage of its provisions if we so desire, just like the other laws to which I have called attention. It is a privilege conferred upon all under the same terms and conditions. That the act was of a general nature and did not have uniform operation throughout the state, was one of the objections made to the "Beatty" township local option law, passed March 3, 1888, 85 O. L. 55, with provisions similar to the "Rose" law with the exception that the township is the unit of territory in which the vote is had and sales made unlawful. Judge Dickman, in *Gordon v. State*, 46 Ohio St. 607, 628 [23 N. E. Rep. 63; 6 L. R. A. 749], disposes of the objection as follows:

"The provisions of the act are bounded only by the limits of the state, and uniformity in its operation is not destroyed, because the electors in one or more townships may not see fit to avail themselves of its provisions. The act makes no discrimination between localities to the exclusion of any township. Every township in the state comes within the purview of the law, and may have the advantage of its provisions by complying with its terms. The operation of the statute is the same in all parts of the state, under the same circumstances and conditions. * * * We cannot reach the conclusion that, because the electors of one township may decline to petition the trustees to order a special election to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited, every other township in the state shall be deprived of that privilege, on the ground that the act is not capable of a uniform operation."

This law was again upheld in *Stevens v. State*, 61 Ohio St. 597 [56 N. E. Rep. 478], and again by the United States Supreme Court. *Stevens v. State*, 10 O. F. D. 81 [179 U. S. 680; 93 Fed. Rep. 793; 21 Sup. Ct. Rep. 917; 45 L. Ed. 384]. The Beal local option law, passed April 3, 1902, 95 O. L. 87, was sustained in *Lloyd v. Dollison*, 13-23 O. C. 571 (3 N. S. 328), afterwards affirmed by the Ohio Supreme Court, *State v. Dollison*, 68 Ohio St. 688, and by the United States Supreme Court, *State v. Dollison*, 14 O. F. D. 380 [194 U. S. 445; 24 Sup. Ct. Rep. 703; 48 L. Ed. 1062].

5. That it violates that provision of the constitution of Ohio which provides that no act shall be passed or take effect upon the approval of

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any other authority than the general assembly. The point is made under this, and the fourth objection, that the power belongs exclusively to the general assembly, and that prescribing an affirmative, a vote of the people as a condition precedent to its active operation, delegates to the people the right to say whether the law shall become effective. This also must be decided in the negative. The vote of the people is a method by which it is determined whether they wish to avail themselves of the provisions of the act. An individual may avail himself of the provisions of an act provided for individual benefit by mere action. But where the act is of such nature that any considerable number are interested and must act in concert, the petition or a vote is necessary to ascertain the majority will. The legislature made the law and prescribed the contingency upon which it should operate. In this behalf Judge Ranney, in *Cincinnati, W. & Z. Ry. v. Clinton Co. (Comrs.)* 1 Ohio St. 77, 89, says:

"It is not the vote that makes, alters, or even approves the law, but, as well remarked by one of the counsel, it is the law that makes the vote, and prescribes everything to be done consequent upon it."

Again on page 90, it is said:

"These views lead to the conclusion that an enactment is not imperfect which makes its execution depend upon the contingent approval of persons designated in it, and that a county organization may be clothed with this discretion; and if the commissioners, the agents of the county, may exercise it, it seems too clear to be doubted, that it may be conferred upon the body of those they represent."

This was another one of the objections made to the "Beatty" township local option law, *Gordon v. State*, 46 Ohio St. 607 [23 N. E. Rep. 63; 6 L. R. A. 749]. After citing a number of authorities from other states, Judge Dickman, speaking for the court, page 631, disposes of the question in this way:

"It is evident, we think, that the act whose constitutional validity is called in question, was a complete law when it had passed through the several stages of legislative enactment, and derived none of its validity from a vote of the people. In all its parts it is an expression of the will of the legislature, and its execution is made dependent upon a condition prescribed by the legislative department of the state. By its terms, it was made to take effect from and after its passage. The qualified electors derive their authority to petition the trustees, and the trustees obtain their authority to order a special election, directly from the legislature. The right of the electors to register their votes for or against the sale of intoxicating liquors, is conferred by the same body. If a majority of the votes cast at such election should be against the sale, the traffic in intoxicating liquors is thereby prohibited and made unlawful, by virtue of the act of the general assembly,

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which may at once, if a change should come over the legislative will, repeal the law and avoid the result of the election. So far from the vote of the electors breathing life into the statute, it is only through the statute that the electors are entitled to vote at the special election. While they are free to cast their votes, the consequence of their aggregate vote is fixed and declared by the act of the legislature. The penal sanction of the act is subject to no modification by the action of the electors, and it is an elementary principle that, 'the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.' 1 Blackstone's Com. 57. In some of the authorities which we have examined, the idea is prominent, that when the voters are called on to express by their ballots their opinion as to the subject-matter of the law, they declare no consequence, prescribe no penalties, and exercise no legislative functions. The consequences, it is said, are declared in the law, and are exclusively the result of the legislative will."

See also, *Peck v. Weddell*, 17 Ohio St. 271, to the same effect.

It may be said in conclusion that the "Beatty" township local option law, the "Beal" municipal local option law, and the "Bran-nock" and "Jones" residential local option laws, are all subject to the same constitutional attacks as are made upon this "Rose" county local option law, and that they have all stood the constitutional test of the highest court in the state. If the "Rose" law is unconstitutional for any of the reasons urged, everyone of the other local option laws is also unconstitutional, but in face the growing sentiment in this state against the saloon, I hardly think that the Supreme Court will overrule a long line of well considered decisions covering a period of fifty years and more up to the present day in order to afford the plaintiff the relief which he seeks.

Holding the views which I have expressed, the demurrer to the petition and amendment thereto is sustained, and the temporary order of injunction heretofore granted herein is dissolved.

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COUNTIES—OFFICE AND OFFICERS.

[Clarke Common Pleas, October Term, 1908.]

STATE OF OHIO v. CHARLES C. COLLINS ET AL.

STATE OF OHIO v. VIRGINIA TWICHELL ET AL.

COUNTY COMMISSIONER, INDIVIDUALLY OR BOND, NOT LIABLE FOR FAILURE OF BOARD TO KEEP HIGHWAYS AND BRIDGES IN REPAIR.

A county commissioner, in the absence of bad faith or corrupt motives, is not liable individually, or upon his official bond, for the failure of the board of commissioners of which he is a member, in keeping the highways and bridges in proper repair.

[For other cases in point, see 3 Cyc. Dig. "Counties," §§ 325-329.—Ed.]

[Syllabus by the court.]

L. E. Laybourn, Pros. Atty., and J. B. McGrew, for plaintiff:

Cited and commented upon the following authorities: *Thomas v. Wilton*, 40 Ohio St. 516; *Gregory v. Small*, 39 Ohio St. 346; *Stewart v. Southard*, 17 Ohio 402 [49 Am. Dec. 463]; *Ramsey v. Riley*, 13 Ohio 157; *Hamilton Co. (Comrs.) v. Mighels*, 7 Ohio St. 109; *Finch v. Toledo (Bd. of Ed.)*, 30 Ohio St. 37 [27 Am. Rep. 414]; *Overholser v. Home for Disabled Soldiers*, 68 Ohio St. 236 [67 N. E. Rep. 487; 96 Am. St. Rep. 658]; *Morgan Co. (Comrs.) v. Transfer & Storage Co.* 75 Ohio St. 244 [79 N. E. Rep. 237]; *Ebert v. Pickaway Co. (Comrs.)* 75 Ohio St. 474 [80 N. E. Rep. 5]; *Hardin Co. (Comrs.) v. Coffman*, 60 Ohio St. 527 [54 N. E. Rep. 1054; 48 L. R. A. 455]; *Rahe v. Cuyahoga Co. (Comrs.)* 16 Circ. Dec. 489 (5 N. S. 97); *Billings v. Dressler*, 7 Dec. 250 (5 N. P. 114); *Slingluff v. Weaver*, 66 Ohio St. 621 [64 N. E. Rep. 574]; *State v. Sloan*, 20 Ohio 327; *State v. Alden*, 12 Ohio 59; *Champaign Co. (Comrs.) v. Church*, 62 Ohio St. 318 [57 N. E. Rep. 50; 48 L. R. A. 738; 78 Am. St. Rep. 718]; *Bray v. Barnard*, 109 N. C. 44 [13 S. E. Rep. 729]; 19 Am. & Eng. Enc. Law (2 ed.) 194, 195; *Hempsted v. Cargill*, 46 Minn. 118 [48 N. W. Rep. 558]; *State v. Tittman*, 54 Mo. App. 490.

Martin & Martin, W. M. Rockel, Hagan & Hagan and Keifer & Keifer, for defendants.

ALLREAD, J.

These actions were brought by the state for the use of Clarke county against the defendants upon the official bonds of the county commissioners of Clarke county to recover the amount the county has been compelled to pay as damages to the owner and occupants of an automobile who were injured by a failure of the board of commissioners to keep the highway and bridge at a certain point in proper repair.

The cases are submitted upon demurrer to the petition. The main and controlling question is whether the commissioners are liable upon

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their official bonds for a failure to keep the highways and bridges of the county in proper repair.

It is conceded that prior to the act of 1894 neither the board of commissioners in their official capacity nor as individuals, in the absence of bad faith or a corrupt motive, were liable to a party injured by neglect to keep the highways and bridges in repair.

The prosecuting attorney who brings this action founds his contention upon the phraseology of Sec. 845 Rev. Stat., as amended in 1894, and Sec. 844, fixing and prescribing the liability of the official bond.

Section 845 provides among other things that:

"Any such board of county commissioners shall be liable in its official capacity for any damages received by reason of its negligence or carelessness in keeping any such road or bridge in proper repair."

Section 844 provides that the official bond of a county commissioner "shall be conditioned for the faithful discharge of his official duties, and for the payment of any loss or damage that the county may sustain by reason of his failure therein."

In the case of the *Hardin Co. (Comrs.) v. Coffman*, 60 Ohio St. 527 [54 N. E. Rep. 1054; 48 L. R. A. 455], it was held that the county through the commissioners in their official capacity was liable to the party injured for neglect, but expressed no opinion as to the liability of the commissioners, individually, or upon their official bonds.

The prosecuting attorney relies upon the last clause of the condition of the official bond providing for the payment of any loss or damage that the county may sustain, etc. It must, however, be noted that the liability to the county is founded upon the failure of the commissioner to faithfully discharge his duty.

The second clause fixing the liability of the commissioner and his sureties is not more burdensome and exacting than his general liability under the first clause providing for a faithful discharge of his official duties.

A condition in an official bond for the faithful discharge of official duties does not add to the common law liability of the officer. *State v. Chadwick*, 10 Or. 465; *State v. Egbert*, 123 Ind. 448 [24 N. E. Rep. 256]; *Seaman v. Patton*, 2 Cai. (N. Y.) 312.

By repeated decisions of our Supreme Court, a public official is not liable individually in the absence of bad faith or a corrupt motive for failure to properly perform a duty involving judgment and discretion. *Thomas v. Wilton*, 40 Ohio St. 516; *Gregory v. Small*, 39 Ohio St. 346; *Stewart v. Southard*, 17 Ohio 402, 412 [49 Am. Dec. 463]; *Ramsey v. Riley*, 13 Ohio 157; *Brown Co. (Comrs.) v. Butt*, 2 Ohio 348.

This rule is specially applicable to officers having charge of high-

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ways and bridges. *Dunlap v. Knapp*, 14 Ohio St. 64 [82 Am. Dec. 468].

The rule established by these cases has been cited with approval in the late case of *State v. Bair*, 71 Ohio St. 410, 427 [73 N. E. Rep. 514].

To create a personal liability for mere failure to perform a duty, say the court in the case of *Dunlap v. Knapp*, *supra*, the duty devolving upon the officer must be "entire, absolute and perfect" and that the repair of roads depends upon a variety of circumstances, chief among which is the availability of unappropriated funds and labor to make the repairs. The duty is, therefore, one of judgment and discretion.

In *Stewart v. Southard*, *supra*, cited with approval in *State v. Bair*, it is said of a private action against a public officer that:

"There is no instance of an action of this sort maintained, for an act arising merely from an error of judgment."

and the court in *State v. Bair* also cites with approval from the case of *Ramsey v. Riley*, *supra*, that:

"An officer, acting within the scope of his duty, is only responsible for an injury resulting from corrupt motives."

In the case of *Dunlap v. Knapp*, it is said that,

"Where a duty is imposed by statute upon minor political organizations, or *quasi* corporations, without their consent, for purposes of public policy, and not for their benefit, but that of the public at large, an omission of such duty lays no foundation for the recovery of private damages, unless such recovery is expressly authorized by statute."

In the case of *Thomas v. Wilton*, *supra*, it is said in the syllabus:

"County commissioners, who act in their official capacity in good faith and in the honest discharge of official duty, cannot be held to personally respond in damages."

So well settled has been the law in this respect that no case of liability has been maintained in any well considered case, although many instances have occurred in which injuries have been inflicted by neglect and "this fact alone," says the court in *Dunlap v. Knapp*, "is strong, if not conclusive, evidence that, in public estimation, no such action is maintainable."

This being the accepted law, not only among lawyers but in public estimation, it would appear that an intention to charge the private liability of public officers and their sureties by an act of the legislature should clearly appear from the terms of the act. It should not be inferred from doubtful words as against public officers and their sureties who have acted upon the general acceptance of the law.

In the act of 1894 the legislature chose the section relating to the public capacity of the commissioners for amendment.

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If the legislature had in mind increasing the liability of the individual commissioners upon their bond they would very probably have chosen Sec. 844 for amendment and given the right of action direct. The language employed indicates that public liability was the purpose of the amendment.

The liability is charged against "the board of county commissioners" and "in its official capacity." The latter clause was evidently intended to emphasize the public character of the liability, and makes still more evident the legislative intent to charge the liability against the county.

The court is therefore forced to the conclusion that the amendment of 1894 of Sec. 845, did not extend the liability of the commissioners individually or upon their official bonds. This view is in harmony with the clear weight of authority, both in text books and in the decided cases. *Abbott, Mun. Corp. Sec. 672-983*; *Tracy v. Swartwout*, 35 U. S. (10 Pet.) 80 [9 L. Ed. 354]; *McCormick v. Burt*, 95 Ill. 263 [35 Am. Rep. 163]; *Nagle v. Wakey*, 161 Ill. 387 [43 N. E. Rep. 1079]; *Waldron v. Berry*, 51 N. H. 136; *Daniels v. Hathaway*, 65 Vt. 247 [26 Atl. Rep. 970; 21 L. R. A. 377]; *Palmer v. Carroll*, 24 N. H. 314.

This view is also sustained by reason. A commissioner is bound to exercise an honest judgment upon all matters of discretion and duty entrusted to him.

The theory of the plaintiff would give the county the advantage of all acts of the officer wherein his judgment was good, and hold him responsible for all errors and mistakes. This is fairly stated in the opinion in *Nagle v. Wakey*, *supra*:

"The towns make their selections of commissioners to exercise their judgment and discretion in repairing and improving the roads and bridges of the towns; and when the public have had a fair and honest exercise of that judgment and discretion, they have got all that we think they are entitled to. It would be against reason to elect commissioners to use their best judgment, and then sue them for doing it. We do not think that the commissioners, who in good faith and to the best of their ability have expended the means at their command where they seemed to them most needed, can be called upon to justify their judgment to the satisfaction of a jury at the peril of their savings."

The liability stated in the petition is founded upon the acts of the commissioners in carelessly, negligently, and willfully permitting the ditch trench or open space ten feet deep between embankments caused by the tearing down or removal of a bridge, to remain open, exposed and unguarded without any protection whatever by means of light signal, railing or other barrier, to apprise passers-by of the existence of said open space.

It may be conceded that a strong case of negligence is stated against

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the commissioners in taking out this bridge and leaving the space open and unguarded, yet no showing of bad faith or dishonesty is made.

The facts stated do not therefore constitute a cause of action, and the demurrers are sustained.

INNKEEPERS.

[Hamilton Common Pleas, June, 1907.]

*JOSEPH HART v. H. ROECKERS.

LODGING HOUSE KEEPER LIABLE FOR VALUABLES BELONGING TO GUESTS.

Sections 4427 Rev. Stat. *et. seq.*, relating to guests' depositing valuables with the landlord for safe-keeping, is for the landlord's protection. Hence, where a guest of a lodging house deposits his money with the proprietor thereof he adopts the best protection, and the landlord will not be permitted to deny the relation of innkeeper and guest upon misappropriation of the money by the landlord's servant.

{Syllabus approved by the court.}

MOTION for new trial.

W. C. McLean, for defendant.

W. A. Rinckhoff, for plaintiff.

WOODMANSEE, J.

In this case the jury returned a verdict for the plaintiff for moneys deposited with the defendant for safe-keeping.

The defendant was the proprietor of a lodging house on Vine street, Cincinnati, in connection with which he served meals and operated a bar. The moneys for which judgment was rendered were left by the plaintiff with the barkeeper. Later the proprietor was advised of the matter, and took possession of the moneys with plaintiff's knowledge, and consent. On the following morning the proprietor delivered the moneys to the barkeeper with the instructions that he return the same to the plaintiff. During the day the barkeeper absconded, taking the moneys with him.

The court instructed the jury that if it found from the evidence that the plaintiff made the barkeeper his agent then he could not recover. The verdict indicates that the jury considered the barkeeper as the agent only of the defendant, and the court believes the evidence justifies this finding.

A new trial is urged for the reason that defendant is not an innkeeper; that plaintiff was not a guest, and that the laws governing the relations of innkeeper and guest do not apply.

*Affirmed, *Roeckers v. Hart*, 30 O. C. C. 709.

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It must be conceded that an innkeeper like a carrier is an insurer against the burglar and the thief. An ancient authority said:

"The defendant if he will keep an inn ought at his peril to keep safely his guests' goods."

The old presumption against the landlord is overcome only by the negligence or fraud of the guest, by the act of God or the public enemy.

Who is a guest? In its broad sense the word is used to designate those who patronize an inn and especially those who take lodging. It was claimed at the trial of this cause that a guest must necessarily be a wayfaring man—a traveler. However, in the case of *Walling v. Potter*, 35 Conn. 183, the court say:

"A person receiving transient accommodation at an inn, for which he is charged by the innkeeper, is a guest, and entitled to all the rights of a guest, although he is not actually a traveler."

In this case it is also held that a man living in the town where the inn is located may be a guest. And an inn is defined to be "a public house of entertainment for all who choose to visit it." The case of *Wintermute v. Clark*, 5 Sandf. 242, holds that:

"To charge defendant as an innkeeper, it is sufficient to prove that he received as guests all who choose to visit his house, without any previous agreement as to the duration of their stay or the terms of their entertainment."

The case of *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, is more directly in point, as it refers to an establishment like the one operated by the defendant herein:

"Where the restaurant forms a part of the establishment and the house is kept under one general management for the receipt of all travelers or *guests* that may come, it is an *inn*—there being no particular difference between it and the Elizabethian inn, in which the traveler paid separately for his apartments and his meals."

Our statute (Secs. 4427 Rev. Stat. *et seq.*), relating to guests depositing valuables with the landlord for safe-keeping is for the landlord's protection. The plaintiff in this case adopted the best protection, and to say now that he was not a guest and that the relation of guest and innkeeper did not exist is not well taken.

The act of Parliament which is now the law of England governing in these matters defines who are guests, but in the absence of a definition in our law we ought to follow the definition established by long usage.

Aside from all this the court is of the opinion that the verdict in this case ought to stand, for the moneys lost were entrusted to the defendant and have not been returned to the plaintiff.

Motion overruled.

Latham v. Railway & Light Co.

NEGLIGENCE PLEADING.

[Franklin Common Pleas, February 3, 1909.]

FOSTER H. LATHAM v. COLUMBUS RY. & LIGHT CO.

1. AVERMENT THAT INJURY WAS CAUSED BY PLAINTIFF'S CARELESSNESS AND NEGLIGENCE NOT TANTAMOUNT TO PLEA OF CONTRIBUTORY NEGLIGENCE.

An averment in an answer to an action for personal injury that the same was caused by plaintiff's own carelessness and negligence, is not tantamount to, but is clearly distinguishable from, a plea of contributory negligence.

2. AVERMENT OF PLAINTIFF'S NEGLIGENCE, COUPLED WITH GENERAL DENIAL, SHOULD BE STRICKEN OUT.

An averment in an answer that the injury was caused by the plaintiff's own carelessness and negligence coupled with, and in addition to, a general denial therein, is immaterial and may prejudice either party, and should therefore be stricken out upon motion.

[Syllabus by the court.]

MOTION to strike out matter in answer.

F. S. Monnett, for plaintiff.

Booth, Keating, Peters & Pomerene, for defendant.

KINKEAD, J.

This is an action for personal injury alleged to have been caused by the negligence of defendant.

Plaintiff avers that he was in the act of stepping onto the lower front step of a car of the defendant, and that while in the act of taking passage on the car, the motorman and conductor maliciously and purposely and negligently started the car with a forward sudden jerk, throwing him in front of the truck of the car, the wheels running over him, injuring him as alleged in the petition.

Defendant answers admitting that plaintiff was injured at the time and place alleged, and "further answering said petition denies each and every allegation therein contained not hereinbefore by it expressly admitted to be true, and avers that whatever injuries the plaintiff received at the time and place stated were caused by his own carelessness and negligence in carelessly and negligently attempting to get on said passenger car, which was south-bound, from the east side and at the front end thereof when it was in motion."

Plaintiff files a motion to strike from the answer as redundant and irrelevant the following:

"And avers that whatever injuries the plaintiff received at the time and place stated were caused by his own carelessness and negligence in carelessly and negligently attempting to get on said passenger

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car, which was south-bound, from the east side and at the front end thereof when it was in motion."

It is asked further that if the last motion be overruled, the last allegation just quoted should be made definite and certain, by stating the precise nature of the defense it may claim thereby; also to state whether the alleged carelessness and negligence of plaintiff contributed to his injury.

The motion seeks also to have the alleged defenses separately stated and numbered.

It is argued in support of the motion that the allegation quoted is tantamount to a plea of contributory negligence, or rather the effort of plaintiff is to compel the defendant to allege that the negligence of plaintiff contributed to the negligence of the company in producing the injury described in the petition. It is contended that to render the claim that the plaintiff has been guilty of negligence, available as a defense, defendant must plead such negligence as *contributing directly* to the injury of which complaint is made.

On the other hand it is urged that the averment challenged is not a plea of contributory negligence on the part of the plaintiff, that there is in it no concession of negligence on the part of the defendant to which the negligence of the plaintiff could have contributed.

The averment is made by defendant in its present form no doubt because of the rule laid down in *Cincinnati Trac. Co. v. Forrest*, 73 Ohio St. 1 [75 N. E. Rep. 818], and in *Cincinnati Trac. Co. v. Stephens*, 75 Ohio St. 171 [79 N. E. Rep. 235]. It is stated in both of said opinions, that contributory negligence on the part of the plaintiff implies negligence on the part of the defendant; that contributory negligence cannot exist unless there has been some negligence on the part of the defendant. It may be urged that this statement was not essential to the decision, as no plea of contributory negligence was made in the case, the answer consisting of a general denial. In *Cincinnati Trac. Co. v. Stephens*, *supra*, the pleading of defendant was a general denial, and the trial court erroneously charged the jury on contributory negligence, when there was no such issue presented by the pleadings. Davis, J., p. 178, says that:

"The defense of contributory negligence is inconsistent with a defense entirely upon the ground that the defendant was guilty of no negligence whatever; because the very definition of contributory negligence implies that there was some negligence on the part of the defendant."

No doubt there are in actual practice many cases according to the evidence adduced, where the line of demarkation between contributory negligence and sole negligence of the plaintiff is shadowy and obscure. Because of this fact, and because the pleader may be in

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doubt as to what the evidence will prove, it may be difficult for him to determine the form of his plea.

The plea of contributory negligence is in effect saying that the defendant may have been negligent, which may be the occasion of some harm to the plaintiff, yet the immediate cause of the injury is not the want of care on the part of the defendant, but that it is due to the failure of plaintiff himself. Contributory negligence cannot be invoked unless it is a proximate cause of the injury. *North Birmingham St. Ry. v. Calderwood*, 89 Ala. 247 [7 So. Rep. 360; 18 Am. St. Rep. 105].

Contributory negligence, therefore, presupposes negligence, and can exist only as a co-ordinate or counterpart. A general denial in effect claims that a defendant has exercised ordinary care and caution. Under such a plea, negligence on the part of the defendant is the issue, and if any injury has been caused, it must occur only by the negligence of the plaintiff, which cannot be considered contributory, but original negligence. If there is no negligence of defendant which causes the injury, there is then no occasion for the consideration of contributory negligence. *Martin v. Highland Park Mfg. Co.* 128 N. C. 264 [38 S. E. Rep. 876; 83 Am. St. Rep. 671].

It cannot be claimed that an allegation of sole negligence of plaintiff is the same as a plea of contributory negligence.

An allegation that the injury complained of was caused solely by the negligence of the plaintiff, presents the same issue as does a general denial. That being true, there is no occasion for such an averment in connection with a general denial, and it is, therefore, surplusage and immaterial, no material issue being thereby presented.

It is urged, however, in support of the propriety of such allegation, that it is not every immaterial averment in a pleading that the court will strike out; that it must not only be immaterial but it must be prejudicial in some way to the plaintiff as well; that is, it must be an unfair advantage to the party pleading it.

Section 5087 Rev. Stat., authorizing redundant and irrelevant matter to be stricken out on motion of the party prejudiced thereby, shows that questions of prejudice or unfair advantage to one side or the other are to be considered upon motions to strike out immaterial allegations in a pleading.

It may be difficult to foretell whether the allegation sought to be stricken out in this case will result in prejudice to plaintiff. Under the pleadings as they now stand in this case, the issues are made up, no further pleading on the part of the plaintiff being necessary, and at trial it would be the duty of the court to state them to the jury. They are simple. Plaintiff says that the injury was caused by the negligence of the defendant, while the defendant by means of its

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general denial denies this. If that be true it was a mere accident. Defendant may show that it was the fault of the plaintiff, or that the injury was caused in some other way not connected with the acts of defendant. It becomes the duty of the court under the pleadings as they now stand, not to permit defendant to introduce evidence to show contributory negligence on the part of plaintiff, and it has no power to charge the jury respecting contributory negligence.

It is quite apparent that an allegation of sole negligence following a general denial, might give rise to much contention and confusion during trial both in respect to the admission of testimony, and in the charge to the jury.

If the allegation of sole negligence as it now stands should be left in the pleading, contentions may arise over questions of evidence, the character and effect of the evidence, as may make it incumbent upon the court to specially charge the jury in such way as to differentiate between sole negligence and contributory negligence, which is liable to prejudice either side.

It is common experience that in the trial of this class of cases, even where there is no plea of contributory negligence, the admission of evidence of acts and conduct disclosing both negligence on the part of defendant as well as on the part of the plaintiff, will be inevitable.

Trial courts frequently experience some difficulty in framing instructions where no plea of contributory negligence is made, but some evidence is properly admitted which shows negligence on the part of both parties.

But it seems clear that if plaintiff should by his own evidence disclose that he was guilty of contributory negligence proximately causing the injury, in connection with that of defendant, defendant is entitled to take advantage thereof, and the trial court should be justified in giving special instructions with reference thereto, although the defendant may not be entitled under his general denial to add anything by way of contributory negligence. This principle is recognized in *Cincinnati Trac. Co. v. Forrest, supra*.

For the foregoing reasons, and because of an apparent growing practice since the decisions of the Supreme Court in the cases cited in this opinion, to depart from the well settled rules of pleading in such cases, it seems imperative that we should adhere to these well settled rules, and that the motion to strike out the allegation of sole negligence, following the general denial should be sustained, which is accordingly done.

This is in conformity to precedent in other jurisdictions. For example in *Ellet v. Railway*, 76 Mo. 518, which was an action for personal injury against a railroad company, defendant filed a general denial, and also a special plea that the injury was caused by thunder-

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storm. It was held that the special plea should be stricken out, as the matter contained could be shown under a general denial.

A paragraph of an answer in an action for personal injuries to a railroad employe, alleging that he was not in the line of his duty because the accident happened during the noon hour, is properly stricken out where the answer contains a general denial, and the complaint alleges that plaintiff was in the line of his duty when injured. *Evansville & R. Ry. v. Maddux*, 134 Ind. 571 [33 N. E. Rep. 345; 34 N. E. Rep. 511].

In *Wilson v. Railway*, 51 S. C. 79 [28 S. E. Rep. 91], it was held that the defense that an injury was caused by a fellow servant was admissible under the general denial. To same effect *Kaminski v. Iron Works*, 167 Mo. 462 [67 S. W. Rep. 221].

The direct question presented by the motion was decided in *Kennedy v. Railway*, 59 S. C. 535 [38 S. E. Rep. 169], where it was held that under a general denial the defendant may show that the injury was caused solely by plaintiff's negligence, since this goes to controvert the allegations of defendant's negligence contained in the petition.

In *Cogdell v. Railway*, 132 N. C. 852, 855 [44 S. E. Rep. 852], the answer alleged that the intestate's death was not caused by any negligence of the defendant but by his own negligence.

The court held that this was not the statement of contributory negligence, "for the law when contributory negligence exists, presupposes the negligence of the defendant, which is denied in the answer, * * * and that "the answer in this respect did not state any matter which could not have been considered under the" denial.

See also *Watkins v. Railway*, 38 Fed. Rep. 711; 29 Cyc. 582.

The sole negligence being admissible under a general denial, the allegation assumes an argumentative form, and is objectionable for that reason.

Under a plea of general denial or of sole negligence of plaintiff, the defendant is limited to proof showing that the defendant was wholly without fault, and that the injury was caused either through the plaintiff's sole fault, or by some other cause wholly disconnected with the neglect of defendant.

If the claim of defendant be other than a general denial, his plea must be by way of confession and avoidance, which is just as potent as it ever was in the old system. If defendant wishes to plead the contributory negligence of plaintiff, it must be in the form of the defense of contributory negligence, which as stated by Davis, in *Cincinnati Trac. Co. v. Stephens*, *supra*, "is inconsistent with a defense entirely upon the ground that the defendant was guilty of no negligence," a rule that has existed so long that the memory of man runneth not to the contrary.

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The only way that a defendant can avoid the force of this rule, and still have the benefit of the defense of contributory negligence, so as to take advantage of evidence which may tend to establish this defense, is to plead the general denial and the defense of contributory negligence in alternative form, which method of pleading is generally sanctioned. Defendant may very properly deny negligence on his part, but claim that if it be found that it is guilty of some negligence, the defendant was guilty of contributory negligence proximately causing the injury, setting out the facts, and separately stating and numbering his defenses.

The rule permitting alternative claims is more liberally exercised in favor of a defendant in pleading his defenses, than to plaintiff in the duplicate statement of his cause of action.

The first branch of the motion is sustained, which disposes of the alternative grounds, thereof. Leave is granted defendant to amend.

ERROR—NEGLIGENCE—STREET RAILWAYS.

[Superior Court of Cincinnati, General Term, March 20, 1907.]

Hosea, Hoffheimer and Swing, JJ.

(Judge Swing of the Hamilton common pleas, sitting in place of Judge Ferris.)

*CINCINNATI TRACTION CO. v. EVA JENNINGS, ADMRX.

1. MERE DESULTORY REMARK ON EVIDENCE OF WITNESS NOT PREJUDICIAL.

A mere desultory remark by counsel in the examination of a witness, not amounting to unfair comment, does not come within the salutary rule which presumes error from the failure of the court to take action upon the unfair comment as amounting to an approval thereof.

2. FAILURE OF THE COURT TO RULE ON OBJECTION DOES NOT WAIVE RESERVATION OF EXCEPTION.

An exception must be reserved to take advantage of statements in argument of counsel to the jury to which objections were made and ignored by the court.

3. SUFFICIENT WARNING TO JURY NOT TO CONSIDER DOCUMENT RULED OUT.

An instruction to a jury, as to a document ruled out, not "to consider any testimony out of the case. I have ruled that out of the case; that document or anything that relates to it" fully cautions the jury in regard to it; the court thereby did all it could fairly have been asked in the matter.

4. DUTY OF MOTORMAN TO HAVE HIS CAR UNDER CONTROL.

An instruction to the effect that if the jury found that a cab driver and a motorman of a car which collided with the cab were both negligent, they might take into consideration whether the motorman had his car under

*Affirmed by the Supreme Court, without report, October 20, 1908, *Cincinnati Traction Co. v. Jennings*, 53 Bull. 401.

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control to such an extent that he could have avoided the accident after he saw, or by the exercise of ordinary care could have seen, the vehicle on the track, is not erroneous.

5. DRIVING IN FRONT OF AN APPROACHING ELECTRIC CAR NOT NEGLIGENCE, WHEN.

A driver of a vehicle is not negligent in attempting to cross a street railway track ahead of an approaching car when the car is so far away that by the exercise of reasonable care it might have stopped before reaching the place of crossing.

[Syllabus approved by the court.]

ERROR to special term.

Kinkead & Rogers, for plaintiff in error.

Healy & McAvoy, for defendant in error.

HOFFHEIMER, J.

This was an action to recover damages for wrongful death. A substantial verdict was rendered by the jury (\$7,650), and in due course judgment was rendered thereon. There is no claim that the verdict is against the weight of the evidence, but error is prosecuted to this court for the reasons taken up *seriatim*—

1. It is claimed that there was misconduct of counsel at the conclusion of the direct examination of witness Della Wright. Plaintiff in error claims that counsel contemptuously remarked, and in the hearing of the jury: "It is very amusing." At page 172 of the record the following question was put:

Q. "Then what happened?"

A. "There was a crash."

Mr. Rogers: "That is all."

Mr. Healy: "That is all. It is very amusing."

Mr. Kinkead: "I take exception to the remark of counsel."

The court, it seems, did not take any action, and the claim is now made that this failure of the court to take action in effect amounted to an approval of counsel's comment, and that it led the jury to suppose that the court was in sympathy with the remark. In other words, that the remark was clearly in the nature of *unfair comment* on the evidence, and that error will be presumed, unless it affirmatively appear that the prejudicial tendency had been removed by a proper instruction given by the court, or by a retraction of counsel, or both. *Cleveland, P. & E. Ry. v. Pritschau*, 69 Ohio St. 438 [69 N. E. Rep. 663; 100 Am. St. Rep. 682]; *Hayes v. Smith*, 62 Ohio St. 161, 186 [56 N. E. Rep. 879].

We do not doubt but that the rule announced in these cases is a most salutary one, when applied to circumstances justifying its application, but we do not believe that the principle was ever intended to apply to a mere desultory remark, such as this appears to have been. In the *Pritschau* case the comments complained of were *numerous* and *untime-*

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ly, and in the Hayes case the frequent recurrence of the objectionable conduct is thus spoken of by the Supreme Court:

"Thus spoken and passing unrebuked by the court, although the attention of the latter was frequently challenged by counsel for defendants, it could not fail to impress itself on the jury as sanctioned by the character of the counsel and approved by the trial judge."

2. As shown on page 206 of the record, one of counsel for plaintiff below in addressing the jury made use of the following language:

"We think the evidence which has been adduced in this case has met substantially the statements made by Mr. Healy in his opening statement to you, although it has been with great difficulty apparently, owing to the objection of the other side to get at the facts in the case."

Counsel for plaintiff in error objected to this statement, and the court said: "Go ahead." By directing the counsel to go ahead, it is claimed the court below expressly endorsed this language, and that this criticism of plaintiff in error's counsel tended to prejudice his client by misleading the jury, and directing their minds from the strict line of inquiry with which they were charged. We note that the record discloses plaintiff in error's objection, and that the court did not rule on the objection. While it may not be necessary to have the court's ruling, an exception must still be reserved. No exception appears to have been reserved, and consequently the point can be given no further consideration.

3. It is claimed that the court erred in failing to instruct the jury that they were to disregard some alleged statements of counsel for plaintiff below, with reference to a certain paper writing, with which counsel was endeavoring to call the witness' attention, evidently to some prior statement made therein. It is not necessary to determine whether the court's ruling was correct (the court sustained plaintiff in error's objection), and we note that the court after it was requested to warn the jury that they were not to pay any attention to any remarks in regard to the paper, said:

The Court: "I fear I would make a mistake as much as if I ruled the other way. I would have to go into the grounds for the ruling at length."

Mr. Kinhead: "I just want them warned."

The Court: "I will say to the jury. I don't want them to consider any testimony out of the case. I have ruled that out of the case; that document or anything that relates to it."

Mr. Rogers: "Or any other statement of counsel that related to that?"

The Court: "No, I decline to do that."

When the court said that the testimony sought to be introduced

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was ruled out, and when it instructed the jury that it was not to consider any testimony out of the case—"that document or anything relating to it"—we think the court had fully and sweepingly cautioned the jury in that regard, and had done all that could have fairly been asked. Without being captious, we do not see, in view of the caution thus given that the court's final instruction, that the jury was to base its verdict on "a consideration of the evidence," how plaintiff in error could have suffered any prejudice for the reason urged.

4. The next error assigned is with reference to the court's general charge to the jury. After instructing the jury on the alleged negligence of the railroad company and the alleged negligence of deceased, the court instructed the jury that, if they should find that the company was negligent, and Jennings was negligent—

"Then it would be your duty to go another step, and go into the examination of the conduct of the servants of the railroad company after they had discovered, or in the exercise of ordinary care could have discovered the danger the driver, Jennings, was in at the time. On that point the duty is on the railroad company, through its motorman, to have its car under what is called control. That is, the car must be in the power, dominion and government of the motorman, to such an extent that when he saw this vehicle on the track, or when by the exercise of ordinary care in his duty of looking out and watching for vehicles, he ought to have seen this cab on the track, he could stop his car within a reasonable time and reasonable distance, so as to avoid, if possible, the collision."

Counsel for plaintiff in error asserts that the court below in giving this charge followed *Pitts. C. C. & St. L. Ry. v. Hall*, 16 Dec. 62 (3 O. L. R. 364), and asks this court to reverse that ruling. Since the case under consideration has been submitted the Hall case has been affirmed by the Supreme Court, and we therefore are of opinion that the charge as given by the trial court was proper. See also, *Lake Shore & M. S. Ry. v. Schade*, 8 Circ. Dec. 316 (15 R. 424); *Cincinnati St. Ry. v. Snell*, 54 Ohio St. 197, 206 [43 N. E. Rep. 207; 32 L. R. A. 276].

5. It is claimed the court erred in giving special charge No. 1. The special charge is as follows:

"It is not negligent in the driver of a vehicle to attempt to cross a street car track ahead of an approaching car, when the car is so far away that by the exercise of reasonable care it might have stopped before reaching the place of crossing."

We think this was justified by the evidence. See also, *Toledo Elec. St. Ry. v. Westenhuber*, 12 Circ. Dec. 22 (22 R. 67, 69), affirmed, without report, 65 Ohio St. 567.

6. Charge No. 4 was also complained of, and we likewise think

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this charge was justified. See Nellis, Street Ry. Co. Acc. Law 704, and cases cited.

We find no error in the court's refusal to give the next special charge, claimed to have been requested by defendant below. The record states that this charge was requested by plaintiff below, but if we have any right under these circumstances to consider this charge at all, we think it would still have been for the jury to say whether the deceased had been negligent in undertaking to pass in front of the approaching car.

The special charges requested by defendant below we think were properly refused, and we are of opinion that the general charge of the court, taken as a whole, was a fair exposition of the law governing the case.

Finding no error prejudicial to the plaintiff in error, we are of opinion that the judgment should be affirmed, and it is so ordered.

Hosea, J., concurs.

SWING, J. (Concurring opinion.)

I have been slow to agree with the majority of the court as to the correctness of the charge of the trial court to the jury in the respect chiefly complained of by plaintiff in error.

The trial court in the charge instructed the jury, pages 5 and 6 of the record, as to ordinary care on the part of the motorman of the car, that in determining the question they—

“Would have a right to say from the testimony how rapidly was the car moving, was a gong being sounded—was it sounded—whether the conditions were such that plaintiff could see the approaching car, the character of the day, and all the circumstances in evidence which would aid you in determining whether ordinary care under the circumstances of the case had been exercised by the defendant company.”

Again, record, page 6, the court said:

“If therefore you should find that the accident was the result of the combined negligence of both plaintiff and defendant, or that it would not have occurred unless the plaintiff himself had been negligent, then no recovery can be had by the plaintiff.”

Again, record, page 7:

“It must appear before recovery can be had that plaintiff was not guilty of contributory negligence.”

The court further said, record, page 8:

“The duty imposed upon the defendant was a duty upon the part of the motorman to keep a vigilant watch and look out for vehicles and persons who might be upon the track—or approaching the track—and

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you are to say from the evidence, whether he did keep such vigilant watch and look out."

Further, record, page 9, the court said:

"If the motorman saw, or in the exercise of his duty should have seen the vehicle on the track or approaching the track, then the duty was imposed upon him of giving such a warning or signal as a man of ordinary prudence would have given."

The court charged the jury quite clearly, record, pages 10, 11, 12, 13, 14, as to the duty of plaintiff being upon the track and the law as to contributory negligence on his part, what due care on his part required, stating again that if he acted without such care and so directly contributed to the happening of the accident, he could not recover.

With all these matters contained in the charge no fault can be found.

But the complaint is that after so charging the jury, the court, record, pages 14, 15, said:

"If you should find that there was negligence upon the part of the railroad company and negligence on the part of Jennings, then it would be your duty to go another step and go into the examination of the conduct of the servants of the company after they had discovered or in the exercise of ordinary care ought to have discovered the danger the driver, Jennings, was in at the time. On that point, the duty is upon the railroad company, through its motorman, to have his car under what is called control, that is, the car must be in the power of the motorman to such an extent as that when he saw this vehicle on the tracks—or when by ordinary care in his duty of looking out and watching for vehicles he ought to have seen this cab on the track—he could stop his car within reasonable time and distance so as to avoid if possible the collision."

It is urged by counsel for plaintiff in error that while it is the law that the motorman after he has seen the vehicle in danger must use his endeavors to stop the car and avoid injury, and a failure to do so, where the injury could have been avoided by his doing so, will excuse contributory negligence, yet actual knowledge on the part of the motorman is necessary to the application of the rule, and that it was error for the court to say that if he did not use such endeavors after he saw, or after he could have seen the danger if he had kept proper watch, the plaintiff could recover notwithstanding contributory negligence; that while a failure to see when he ought to have seen is negligence which makes the company liable, it is not such negligence as will excuse contributory negligence; that the court had already charged the jury to that effect and that this last charge was necessarily a contradiction of the former instruction if not itself contradictory in terms. This

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seems to me true unless it can be said that there may be negligence in not seeing and then further negligence in not seeing.

But after having read the entire record in the case, and after having considered the whole charge with care, I am inclined to think the error, if error it was, not so calculated to mislead and confuse the jury as to have been prejudicial to the defendant company and to require a new trial of the case, the verdict being warranted by the evidence.

I am the more inclined, if not indeed required, to concur with my associates in affirming the judgment of the court below as to this question in the charge for the following reasons: This court, general term, Judge Littleford of common pleas sitting and dissenting, in case of *Pitts. C. C. & St. L. Ry. v. Hall*, 16 Dec. 62 (3 O. L. R. 364), held, as stated in the syllabus, as follows:

"It is a proper instruction to the jury to say that a plaintiff may recover, notwithstanding his own negligence exposed him to risk of the injuries of which he complains, if the defendant, after he became aware or ought to have become aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him, and he was thereby injured."

The judgment of this court in the Hall case was recently affirmed by the Supreme Court without report.

The same charge, or substantially the same, was held good in the circuit court of Cuyahoga county in the case of *Lake Shore & M. S. Ry. v. Schade*, *supra*, which was affirmed by the Supreme Court without report. The last reported case on the same or substantially the same question, as it appears to me, decided by our Supreme Court, is the case of *Erie Ry. v. McCormick*, 69 Ohio St. 45 [68 N. E. Rep. 571], in which it is held in the syllabus as follows:

"In an action against a railroad company by one who, by his own fault is upon its track and in a place of danger, to recover for a personal injury caused by the failure of its employes operating one of its trains to exercise due care after knowledge of his peril, it is necessary to show actual knowledge imputable to the company. *Railway v. Kassen*, 49 Ohio St. 230 [31 N. E. Rep. 282; 16 L. R. A. 674], distinguished."

In the opinion in the McCormick case, the court, speaking of "the law which defines liability for the wanton and willful infliction of the injury," says, page 53:

"The concrete rule upon the subject is, that if one is upon the track of a railway company by his own fault and in peril of which he is unconscious, or from which he cannot escape, and these facts and conditions are actually known by the engineer, it is his duty to exercise all reasonable care to avoid the infliction of injury."

Again it is said in discussing the Kassen case:

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"It is entirely clear, therefore, that the liability of the company was placed upon the sole ground that after receiving actual notice that Kassen was upon the track and in a position of peril, it failed to use the means at hand to avoid injury to him."

It is also said in the opinion as to the rule:

"It does not impose the duty to exercise care to discover that one so upon the tracks (*i. e.*, upon the track by his own fault), is in a place of danger, but it does impose a duty to be exercised upon the actual discovery."

The decision in the McCormick case has not been reversed or modified by our Supreme Court in any reported case.

It is urged that the rule stated in the McCormick case does not apply to a street railway case, where a person had an equal right with the street car to the use of the part of the street occupied by the car tracks and where the motorman is required to keep a lookout for persons on the track. Although it is held in *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326 [64 N. E. Rep. 130], that "It is the duty of a locomotive engineer to keep a lookout on the track ahead of the train," and to use ordinary care to prevent injury to a person who is evidently going on the track, I am not able to see clearly that the distinction is a good one. I am not able to see clearly how there can be "the wanton and willful infliction of injury" in a street railway case any more than in a steam railway case, without actual knowledge, or how it can be said that if the defendant company was negligent in not seeing the person on the track and the person on the track was also negligent, guilty of contributory negligence, the plaintiff cannot recover, and yet that it can be said that if the defendant company was guilty of negligence in not knowing that the plaintiff was on the track, such negligence will excuse the contributory negligence of the plaintiff under all the circumstances.

If the plaintiff in a street car damage case cannot be held accountable for contributory negligence when the negligence of the motorman was in not seeing him when he should have seen him, is there then any such thing as contributory negligence in a case where one is struck by a moving car?

I do not say that there may not be a case in which the negligence is so gross as to be practically "wanton and willful," and wicked, but that, I think would be different from the ordinary case of negligence of the motorman in not seeing when he should have seen, and governed by a different rule, the very rule as to wanton and willful negligence where the failure to see was practically as gross and culpable misconduct as the failure to use care after seeing, but it is not claimed that this is such a case.

Nevertheless, as I have said, in view of the facts in this case, re-

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garding the verdict as warranted by the evidence, and considering the error, if any there was, as not prejudicial in this particular case, and in view of the decisions which I have quoted as affirmed without report, I concur in the affirmance of the judgment of the court below.

OPINION ON REHEARING.

PER CURIAM.

The overwhelming consensus of testimony shows that the defendant's cab was upon the car track in front of the car a considerable time before the collision. The plaintiff in error attempted to show that it turned completely out of the track and the motorman put on increased power, and that defendant's cab came on to the track again too close to the car to avoid a collision. This was the issue of fact submitted to the jury. Their verdict is in accordance with the weight of the testimony in favor of the contention of plaintiff below, and cuts out the basis of fact on which alone the last chance doctrine could rest.

Under the testimony we do not see how any other verdict could be sustained. This being so, the errors of the trial court complained of are immaterial. *Jordan v. James*, 5 Ohio 88; *Portage Co. Bank v. Lane*, 8 Ohio St. 405; *Mehurin v. Stone*, 37 Ohio St. 49; *Elster v. Springfield*, 49 Ohio St. 82 [30 N. E. Rep. 274].

Judgment affirmed.

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CORPORATIONS—INSURANCE—PARTIES.

[Superior Court of Cincinnati, 1908.]

***ROBERT MENGE, ADMR. v. CINCINNATI CHAMBER OF COMMERCE MUT. INS. CO. ET AL.**

1. MUTUAL INSURANCE COMPANY PRESUMED A LIVING CORPORATION IN ABSENCE OF INDEBITABLE PROOF OF ITS DISSOLUTION.

A mutual insurance company, by adopting the plan of organization provided by Sec. 5783 Rev. Stat. *et seq.*, becomes a legal entity, and though the continuity or perpetuity of which depends upon statutory circumstances, it cannot cease to be a corporation or conclude its existence until it complies with the statutory regulations for winding up the affairs of a corporation; failure to comply with conditions imposed by the insurance commissioner, etc., although preventing activity along certain lines, does not effect dissolution.

2. MEMBERS OF MUTUAL INSURANCE COMPANY NOT NECESSARY PARTIES TO PROCEEDING TO WIND UP ITS AFFAIRS.

An action for the appointment of a receiver to collect the assets and discharge the liabilities of an undissolved insolvent mutual insurance company is properly brought against the corporation as such by name; and members or stockholders, not being necessary parties, cannot interpose by motion after a receiver is appointed, a reference had and report confirmed, to be made parties defendant to the order of court directing the receiver to proceed to the collection of assessments from members and discharge the liabilities of the company.

[Syllabus approved by the court.]

W. T. Porter, for plaintiff.

Galvin & Bauer, for defendants:

Cited and commented upon the following authorities: *Brockman v. Building & Sav. Co.* 7 Dec. 291 (5 N. P. 61); *Langworthy v. Garding*, 74 Minn. 325 [77 N. W. Rep. 207]; *Stilwell v. Carpenter*, 59 N. Y. 414; *Lattimer v. Glass Co.* 7 Circ. Dec. 430 (13 R. 163); *Trumbull Co. Mut. F. Ins. Co. v. Horner*, 17 Ohio 407; *Lucas v. Building & Sav. Assn.* 22 Ohio St. 339; *Gaff v. Flesher*, 33 Ohio St. 107; *Society Perun v. Cleveland*, 43 Ohio St. 481 [3 N. E. Rep. 481]; *Richards v. Lipp Co.* 69 Ohio St. 359 [69 N. E. Rep. 616; 100 Am. St. Rep. 679]; *Tone v. Columbus*, 39 Ohio St. 281 [48 Am. Rep. 438]; *Matt v. Protective Soc.* 70 Iowa 450 [30 N. W. Rep. 799]; *Mt. Vernon v. State*, 71 Ohio St. 428 [73 N. E. Rep. 515; 104 Am. St. Rep. 783]; 2 Page, Contracts 1084; *State Mut. Ins. Assn. v. Stave & Head. Co.* 61 Ark. 1 [31 S. W. Rep. 157; 29 L. R. A. 712; 54 Am. St. Rep. 191]; *Union Mut. Life Ins. Co. v. McMullen*, 24 Ohio St. 67; *Manhattan Ins. Co. v. Ellis*, 32 Ohio St. 388; *Tod v. Wick Bros.* 36 Ohio St. 370; 2 Bacon, Ben. Soc. & Life Ins. Sec. 378; *McDonald v. Ross-Lewin*, 29 Hun 87; *Smith v. Brown*, 75 Hun 231 [27 N. Y. Supp. 11]; *Ellerbe v. Barney*, 119 Mo. 632 [25 S. W. Rep. 384; 23 L. R. A. 435]; *New Era Life Assn. v. Rossiter*, 132 Pa. St.

*Affirmed by Supreme Court, without report, *Cincinnati Chamber of Commerce Mut. Ins. Co. v. Menge*, 77 Ohio St. 635.

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314 [19 Atl. Rep. 140]; *Vanatta v. Insurance Co.* 31 N. J. Eq. 15; *Akers v. Hite*, 94 Pa. St. 394 [39 Am. Rep. 792]; *Calkins v. Angell*, 123 Mich. 77 [81 N. W. Rep. 977]; *Providence Mut. Rel. Assn. v. Pelissier*, 69 N. H. 605 [45 Atl. Rep. 562]; *Fulton v. Stevens*, 99 Wis. 307 [74 N. W. Rep. 803].

FERRIS, J.

This matter comes on now for disposition on questions raised by motion for leave to be made parties defendant, and for the setting aside of an order heretofore made by the court on February 23, 1906.

The petition itself furnishes the best evidence of the nature of this action. That petition filed September 2, 1905, alleges for a cause of action the appointment of the plaintiff as the administrator of the estate of Elizabeth Dees, whose decedent, Conrad Dees, died leaving among other assets a policy of insurance in the Cincinnati Chamber of Commerce Mutual Insurance Company.

The allegations of the petition made apparent that the plaintiff was entitled, under a contract of insurance theretofore issued by the Chamber of Commerce Mutual Insurance Company, to the sum of \$3,000.

The allegations show that the Chamber of Commerce Mutual Insurance Company was at the time of the death of Conrad Dees engaged in the business of selling insurance on the lives of its members and collecting assessments for the same; and for a breach of that contract plaintiff says that the company has failed and neglected and refused to levy or collect any assessments upon its members, as it was required to do by the terms and provisions of the constitution, and that antecedent and proper efforts have been made to secure payment without result.

Plaintiff charges various derelictions of duty on the part of the officers and inability to ascertain conditions of expenses and earned liabilities; sets forth the failure to comply with the requirements of the statutory provisions of various kinds, and states that the corporation, therefore, required the intervention on the part of this court, through the appointment of a proper representative of the court, to collect the assets and discharge the liabilities; and, for the purpose of ascertaining what the real condition of the company is, that a reference be had to advise the court of the true condition of the affairs, determining the liabilities of the organization and asking for a judgment that shall determine the status of the parties, both as to this and to all other matters that will indicate the conditions of the assets and liabilities.

It is important to note that the parties defendant in this case are the insurance company and those persons who represent it, and if a period had been placed at the end of the expression "the Cincinnati

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Chamber of Commerce Mutual Insurance Company, duly incorporated under the laws of the state of Ohio," it would have been exactly the same as to have added, A, B, C, D, E, F, G, H, Directors, unless it be that a relief not found in the petition were sought that would require the application of rules that the court does not, in view of all that has appeared, find it necessary to apply in this particular case. The Chamber of Commerce Mutual Insurance Company—I shall use that expression hereafter referring to the defendant—was duly served with summons; it was represented by counsel and in due course of time after proper process the court found that the relief sought for should be granted, and on September 19, 1905, made the following order:

"This day this cause came on for hearing on the appointment of a receiver, and the same having been submitted to the court, and the court having been fully advised in the premises, finds that said motion is well taken and should be granted."

And thereupon the court appointed a receiver and also appointed a referee, whose report was made on February 9, 1906, in which report will be found a complete statement of all and singular the matters connected with the condition of this company, as appears by the testimony that was taken under the following notice:

"Notice is hereby given that the undersigned has been appointed and qualified as Receiver of the Cincinnati Chamber of Commerce Mutual Insurance Company, in case No. 52699 Superior Court of Cincinnati, *Robert Menge v. The Cincinnati Chamber of Commerce Mutual Insurance Company and others*. All persons having claims against said company should present same to Rupert B. Robertson, Referee, Carew Bldg., Cincinnati, Ohio, in the said cause not later than the first day of December, 1905. Sanford Brown, Receiver."

On the coming in of the report of the referee the court did, on February 23, 1906, make the following order appearing as a decree of confirmation, which reads as follows:

"This day this cause came on for hearing on the motion of the plaintiff to confirm the report of the referee herein; also the report of said referee, pleadings, exhibits and evidence and was submitted to the court.

"And the court find that due notice of the pendency of said motion to confirm said reports and the hearing by said referee was given to all persons and parties interested in said cause.

"The court upon examination of said report find that the said hearing by the referee was had in accordance with the law and order of the court and the findings and conclusions by said referee made as set forth in said report are in all respects according to law and said orders of the court, and the court doth approve and confirm the same

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and judgment thereon is awarded in accordance with the findings of said referee.

"It is therefore ordered, adjudged and decreed that said report and all findings and conclusions by said referee may be and the same hereby are ratified, approved and confirmed. And the court being fully advised in the premises finds that said Cincinnati Chamber of Commerce Mutual Insurance Company was at the time found by the referee insolvent and is now insolvent and unable to pay its debts and that it is necessary to make an assessment on all persons who are liable for its debts to pay the death losses and other liabilities of said company together with interest thereon, and the reasonable expenses of winding up the affairs of said company in accordance with the law.

"The court further find that the expenses of litigation which include all the expenses and costs of winding up said company will be 50 per cent of the amount for which each member is severally liable according to the report of said referee.

"And the receiver heretofore mentioned is hereby directed and given full power to sue for and collect the full assessments made in accordance herewith, including said additional assessment for costs when thirty days have elapsed, after due notice thereof has been given to respective members and shareholders liable herein. And said receiver shall sue for all money due said company and not paid upon due demand and shall settle, adjust, pay and discharge all debts and liabilities due from said company to the extent the same may be authorized and to secure and pay all the necessary expenses in the performance of the duties devolving upon him as such receiver herein for the purpose of properly and legally winding up the affairs of said business.

"Said receiver is further authorized to compromise the assessments of all persons who appear to be insolvent and for such sums as he deems just and proper.

"As to the distribution of the additional assessment made for the purpose of paying the costs of winding up of said company this cause is continued for further order."

That order of the court stands unreversed and unsatisfied, in full force and effect, and that was the condition of affairs on April 11, 1906, when a motion was made by a number of persons asking to be made defendants and for the setting aside of the order.

The first question, therefore, that addresses itself to the court is, are these persons proper parties defendant in an action of the character as thus defined by the pleadings? An analysis of this petition leaves no doubt as to the character of the litigation as set in operation by the filing of the petition. Plaintiff's decedent was a policy holder in a mutual company, not a stock company, had a valid claim, so far as the court knows, that necessitated the institution of certain things in

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order to cancel or liquidate the indebtedness due and owing under the policy of insurance. The company, so far as the court is advised by the pleadings, was in full force and operation, it becoming a legal entity by reason of the adoption of the plan set forth in the statute by which such companies obtain a right of existence (Sec. 5783 Rev. Stat. *et seq.*) The continuity or perpetuity of such organizations depends upon circumstances which are also treated by the statute, but no corporation ceases to exist in law until such steps are taken as legally determine, conclude and end its existence. The fact that the means adopted by the statute are not taken advantage of, or the fact that the company does not act up to the full measure of its authority, or the further fact that the company has not complied with the conditions of the law as determined by the commissioner of insurance, does not wind up the company. It prevents activity along certain lines, but until the statute regulating the manner of winding up a corporation has been set in force and termination had under such provisions of law, it is exactly the same as though the corporation were acting in every respect in accordance with its privileges and were in full force as an active corporation. In other words, the books furnish indubitable proof of the fact that a corporation once living is presumptively living until proved to be dead. It is as though the principle of once sane always sane until shown insane applies. In other words, the continuity of relation will be presumed until the contrary is shown.

This company was, therefore, at the time of the bringing of this suit, in law undissolved. It had not been wound up, and the statute relating to the manner in which insurance companies or corporations shall be concluded was not complied with. Therefore it follows that at the time of the institution of this suit this company was in law a body corporate, and all of the rules furnished by the statute relating to the manner of service, as to who parties defendant, are applied with full force and effect to this corporation and, therefore, it becomes necessary for us to address our attention to the question as to who are necessary parties in a suit against a corporation. This is elementary—not the stockholders, not the directors, but the corporation. Then the statute makes full and ample provisions for the manner in which the liability of those who are secondarily liable shall be worked out. The source of all authority in a corporation is the stockholder. There is no stockholder here, but the delegated right of the persons interested to the directors furnish them plenary jurisdiction in determining all questions of policy circumscribed and limited only by statute, which authorizes the formation of such companies.

Therefore when this action was brought against the Chamber of Commerce Mutual Insurance Company it was not necessary to have joined various persons who are interested by reason of their contract

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relations with the Cincinnati Chamber of Commerce Mutual Insurance Company, and it was properly served and it was in court by counsel and in *Wilkins v. Bank*, 31 Ohio St. 565, to complain because they were not necessary parties and the action was primarily against the insurance company, and it was properly served and it was in court by counsel and it had its rights, having its day in court fully passed upon by the proceedings that were instituted, and the application, therefore, of certain parties to be made defendants finds its answer in the fact that they have once had their day in court and have been represented by the organization thus properly served and thus appearing, and its having its right adjudicated and passed upon by the court.

The converse of the proposition named in the statute, that every suit must be brought in the name of the real party in interest, finds expression in the statement that every action must be brought against the party legally bound to answer. In this case there can be no question but what the real party defendant was the Cincinnati Chamber of Commerce Mutual Insurance Company. I propose here to pass no strictures upon the manner in which the business of that concern was conducted. It is sufficient to say that having held itself out as a legal corporation, it must be treated as such and, therefore, I have said as much as I care to say with reference to that part of the motion that asked for permission of certain persons to be made defendants. They cannot be made defendants. The analogy, if we needed further strength to the support of this proposition, comes with reference to the attack that has been made upon what the referee did. The referee stands in the place of the court, a delegated authority by the court to furnish certain evidence upon which the court could predicate a proper judgment or decree; a limited authority, limited only, however, to the terms of the order creating a reference and within the scope of such authority, having the fullest jurisdiction to examine parties, hear proofs, examine exhibits, pass upon questions and testimony and furnish the court the result, with recommendations as to the condition. Such reference being judicial when passed upon by the court became the predicate of the court's order and was first, by the order of confirmation, made the binding order that should determine all parties with reference to the matter involved in that report.

As the assignee represents all of the creditors of an estate; as the administrator represents the creditors of the decedent's estate, so does the officer of the court stand in a position where he holds the scales even for the purpose of presenting to the court all of the facts that relate to all of the parties in the case, and when the court finally adjudicates all parties thereto are bound.

Second proposition: I am asked to set aside this entry of confirmation that is made after the end of the term in which the order was

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made. I could do this only when satisfied that the verdict (a) that is referred to in the statute appeared to be of such nature as that a review would be required because such verdict denied substantial justice or was a plain infraction of legal duty, (b) a misapprehension on the part of the court's officer, (c) misapprehension on the part of the court of the legal situation.

The statute is very clear upon limiting and defining within a very close circle the activities of the court in matters of this kind. The rule is that no entry ought to be made until the court has been fully advised, and when advised and when the order is made it stands as the law of the case until reversed, until reviewed by an appellate jurisdiction. No court should set aside an order unless acting strictly within the lines of the particular statute that authorizes such action.

I have reviewed carefully the statutes and the decisions under them time and again. I find nothing in the case that justifies the setting aside of this order, when I remember the rule that has been determined as to primary liability and gives to these parties who are filing this motion, but are not proper parties to be made defendants, a right to set up any proper defenses that they may have. My hope was that if the defenses could be made in this action, that it might be possible for the court to work out an easy and ready solution. That is impossible, reserving intact the rules of law as I have defined them. I am the more convinced as I have studied this case that there are other and deeper and broader reasons and more conclusive reasons why this court ought not disturb this judgment entry in view of the rules which I apprehend exist and apply to cases of this character, and which rules have been clearly defined by the authorities that the court has felt pivoted and weighty in matters of this character, and for that reason after examination, I have determined to deny this motion as to both parts. Judgment accordingly.

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CONTRACTS—PARTIES—PLEADING.

[Cuyahoga Common Pleas, September 22, 1908.]

I. N. KINNEY AND ALBERT DIX v. J. F. POCOCK ET AL.**1. JOINDER OF CAUSES OF ACTION.**

Several and independent causes of action growing out of a single breach of a contract may be joined in an action where the proof of the default is the same as to each and every cause of action joined, and hence, all parties having such rights of action may intervene by cross petition in an action brought by one for the benefit of the class of intervenors.

2. ALLEGATION THAT ONE SUING FOR THE BENEFIT OF ALL PERSONS HAVING AN INTEREST FAILED TO OBTAIN AUTHORITY TO SUE IS IRRELEVANT.

Subscribers to a fund to build and locate a factory in a given place, though more than eleven hundred in number, have the right, upon breach of the contract by the manufacturers, to be joined as plaintiffs under Sec. 5005 Rev. Stat., as persons having a common or general interest in the subject of action, and because of their number and the impracticability to bring all before the court, an action may be brought, under Sec. 5008 Rev. Stat., in the name of one or more for the benefit of all. Hence, an allegation in the answer, that plaintiff brought the action without authority from the others and without their knowledge or consent, tenders no issue and is irrelevant, for which a motion to strike out will be sustained.

3. NECESSITY OF ALLEGING THAT REPRESENTATION RELIED UPON IS FALSE.

A representation, by way of inducement to locate a manufacturing plant on a certain site donated, that the land was safe from the overflow of a nearby stream is one of fact as to the character of the location, to which an allegation that at a subsequent time to that when the representation was made, the land overflowed from high water of such stream, states no fact alleging such representation to have been false when made, and demurrer will lie.

4. ALLEGATIONS ALLEGING FAILURE TO EMPLOY BOY LABOR IN BUSINESS NO DEFENSE TO ACTION FOR BONUS UPON DEFAULT.

Allegations, in an action for the return of a bonus upon default of a contract by which defendants in consideration of \$20,000 donated therefor, were to build a glass factory, keep it running ten months in each year for ten years, employing not less than two hundred operatives and in case of default to return said bonus, (1) that plaintiffs knew defendants intended to employ boys because of the cheapness of such labor and were induced to enter into the contract on that account, (2) that plaintiffs joined with others in a crusade against boys working in a business of manufacturing beer bottles because of its alliance with the liquor traffic, and thereby prevented them from hiring boys, made it impossible to carry on the business with profit and caused the default for which and by reason of which they sue for the return of the money so advanced, state no conduct violative of any contract provision, nor charge conspiracy and, hence, set forth no defense.

5. WAIVER OF BREACH OF SUBSCRIPTION CONTRACT BY ACCEPTING DEFERRED PAYMENTS.

The receipt in whole or in part of payments of a bonus at a time subsequent to that agreed upon is a waiver of time of payment and of breach of the contract by reason thereof, consequently subscribers cannot thereby be barred of the right to recover upon default in performance of the principal contract.

[Syllabus approved by the court.]

Kinney v. Pocock.**Kean & Adair and Blandin, Rice & Ginn, for plaintiffs.****R. W. McCaughey and Kline, Tolles & Goff, for defendants.****BABCOCK, J.**

I. N. Kinney and Albert Dix sue for themselves and some eleven hundred others voluntarily associated as the board of trade of Wooster, Ohio. The defendants entered into a contract with the members of this association for locating and building glass works in said city of Wooster, in which some two hundred workmen should find employment, the defendants agreeing to keep the factory running ten months in the year for ten years. The board of trade of said city, assuming to act for, and in the name of, the citizens of Wooster, agreed to pay the defendants \$20,000 for the things so stipulated by them to be done. Among other things in the contract was one providing for a return of the money without interest so paid by the plaintiffs to the defendants in case default was made by them in carrying out the terms of the contract above outlined. The plaintiffs sue for breach of the contract and ask judgment for \$18,500, the amount actually advanced to the defendants under the contract. To the petition is attached as an exhibit a copy of the contract. It recites that it is entered into by, and between, James F. Pocock and the three other defendants (naming them), parties of the first part, and "the citizens of Wooster, parties of the second part, pursuant to a proposition made by said parties of the first part to the citizens of Wooster through its board of trade." The last clause of the contract is as follows:

"And we hereby authorize the president and secretary of said board of trade to execute said contract for and in behalf of the board of trade of the city of Wooster as party of the second part."

The contract is signed by each of the defendants and by "I. N. Kinney, President Pro Tem" and by "Albert Dix, Secretary."

The defendants answer, among other things: (1) That the plaintiffs have brought this action without authority from the several subscribers of said fund other than themselves. (2) That they were engaged in the manufacture of glass bottles at Massillon, Ohio, being largely engaged in a bottle factory there; that early in 1902 the defendants were contemplating building another plant where labor might be readily obtained, and the plaintiffs learning of this, offered to contribute liberally toward the construction of a plant at Wooster similar to the defendants' plant in Massillon, Ohio; that plaintiffs invited defendants to Wooster and showed them the premises upon which the factory was afterwards built; that it lay near a stream of water called "Killbuck," and "defendants being solicitous lest the land might be subject to flood and overflow from said stream during high water, made inquiry of plaintiffs and its committee with respect to the fact concerning such danger of flood and overflow, and were thereupon assured

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by them that there was no such danger, they stating and representing to the defendants that said proposed site was and would be entirely safe from all flood or overflow from said stream. Thereupon, relying upon said representations and the further one that the citizens of Wooster were desirous of having the proposed factory located in that town, the proposed site was selected and the contract was entered into. (3) The defendants say the factory was thereupon constructed by the defendants upon said site, was completed and full operation begun in January, 1903, but that in January, 1904, said factory was flooded with water from the high water and overflow of said stream. They say that the flood caused great damage to the factory, ruining the machinery and the manufactured product therein to a great extent, greatly damaging the defendants and making it impossible for them to operate the factory without making expensive repairs and replacements of great cost and necessitating in any event a delay of many months before the factory could again be got ready for operation. (4) That as soon as the factory could be operated a spirit of hostility against the same was manifested by the citizens of said city; that it was necessary for the successful operation of the factory for the defendants to employ a large number of boys because of the cost of adult labor in such work, making it impossible to operate the same with such labor at a profit; that the plaintiffs and the board of trade were aware of this fact and that it would be necessary for the defendants to employ a large number of boys in the operation of the proposed factory at the time defendants were solicited to locate the factory in Wooster, but after having prevailed upon them to locate a factory in the town, they urged the citizens of the town not to permit their boys to enter into defendants' employ in said factory by the use of public statements and by articles published in the public press stating that it was not proper for boys to work in a factory where beer bottles were manufactured; that these statements and utterances were made generally by members of the board of trade and by a large number of the leading citizens of said city and by many of the persons claimed to be represented by plaintiffs in this suit, and that these statements and utterances stirred up and created such a feeling of hostility against the defendants and said factory in the community as deterred parents from permitting their boys from entering the said employment, so that the defendants were unable to procure boys to do the work customarily performed by boys in such factories, and were compelled to employ men to do the work of boys, at more than twice the cost, entailing great loss on defendants and making it impossible to operate the factory at a profit. They say that in spite of the hostility manifested by the citizens of said city and by the persons whom plaintiffs represented, and, in spite of the fact that about \$1,500 of the amount agreed to be paid under said con-

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tract had not been paid, the defendants in good faith went forward with the contract on their part and proceeded to put the factory in shape for commencing operations for the year 1904, when the factory was flooded with water from the high water and overflow of said stream. They say that by reason of this hostility which was stirred up in the town by the citizens and persons represented by the plaintiffs, it has made it impossible for the defendants to procure necessary labor to operate the factory, and by reason of the damage done to the factory by the flood, making necessary the expense of repairs and the loss of nearly an entire season of operation, they suffered a loss amounting to more than the \$20,000 and were unable to go forward with the enterprise, and to save themselves from still greater loss were compelled to, and did, in September, 1904, sell the factory to the Ohio Bottle Company. That said sale was made at a price less than the cost of the factory and that the defendants sustained loss on account of entering into the contract existing in the sum of \$35,000. They say that by reason of the conduct of the citizens of Wooster and of the persons who subscribed to the fund to be paid the defendants whom plaintiffs claim to represent, and by reason of the said misrepresentations with respect to the factory site, they were entitled to terminate the contract on their part and were justified in so doing. Wherefore, they pray to be dismissed with their costs.

On November 14, 1907, Hugh Bowers and eight others by leave of court became parties defendant and filed their cross petition against the defendants, saying that they were parties to the contract signed by the defendants and contributed to the fund raised by the citizens of Wooster, as alleged in the petition, and after setting up their respective subscriptions, they say "they adopt all the allegations of the plaintiffs' petition and make the same a part hereof as fully as if rewritten herein and join in the prayer of the petition and ask that judgment may be rendered in favor of the said I. N. Kinney and Albert Bicks, plaintiffs."

On the same day, by leave of court, Walter D. Foss, Charles M. Gray and Albert Dix, trustees for the board of trade of the city of Wooster, leave having been obtained to become parties defendant, filed their cross petition, and, after alleging that about three hundred of the members of said board of trade who were subscribers to the fund have transferred and assigned all their rights against the defendants in the cause of action set out in the petition to them as trustees, make the same allegations as in the cross petition of Bowers and others, praying that judgment may be rendered in favor of said plaintiffs against said defendants.

Thereupon the defendants moved to strike from the files the cross petition of Hugh Bowers and others, and by separate motion they ask that the cross petition of Walter D. Foss and others, trustees, be

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stricken from the files for the reason that said persons are not proper parties to this cause and these cross petitions are not such pleadings as are authorized by law to be filed herein.

The plaintiffs file a motion to strike out of the first defense in the defendants' amended answer certain redundant and irrelevant matter, to wit, the allegation that the plaintiffs have brought the action without authority from the several subscribers of the fund and without their knowledge or consent, and that the defendants be required to make the second defense more definite and certain by stating the period in the manufacturing season of 1902-3, the factory was operated, and during what months and for what part of the season 1904-5 the factory was operated by the Ohio Bottle Company.

They also ask that the third defense be made more definite and certain (a) by stating the name or names of those who assured the defendants that there was no danger of flood and overflow from said stream, and that the site was and would be entirely safe from flood and overflow; (b) by stating the name or names of those who represented to defendants that the citizens of Wooster were desirous of having the proposed factory located in that town; (c) by stating the names of those who manifested a spirit of hostility against the operation of said factory, and how the same was manifested; (d) by stating the name or names of those who by public statement and by articles published in the public press and by circulars urged the citizens of the town not to permit their boys to enter into the defendants' employ; (e) by stating what statements were made, and what articles published, by each of said persons; (f) by stating more fully and explicitly the injury done to the machinery and the manufactured produce by reason of flood, and the expense for repairs occasioned thereby.

Plaintiffs demur to the defendants' third defense on the ground that the same does not constitute a defense to the plaintiffs' cause of action.

The right of the cross petitioning defendants to intervene will be first considered. It has already been held on demurrer that the action is maintainable by the plaintiffs in its present form under Sec. 5005 Rev. Stat., giving the right to "all persons having an interest in the subject of the action and in obtaining the relief demanded" to join as plaintiffs, supplemented by Sec. 5008 Rev. Stat., which provides "when the question is one of a common or general interest of many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all;" or, if not under these provisions, then under Sec. 4995 Rev. Stat., authorizing an action by the trustee of an express trust, or one "with whom or in whose name a contract is made for the benefit of another." The court is of opinion that all subscribers to the fund might have joined under the first named section and that by reason of

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numbers the action was properly brought by two of them for the benefit of all. *Upington v. Oviatt*, 24 Ohio St. 232; *Platt v. Colvin*, 50 Ohio St. 703 [36 N. E. Rep. 735], and *Farmers Mut. Fire & L. Ins. Co. v. Ward*, 24 O. C. C. 156 (5 N. S. 509), are believed to sustain this position. When such a case is brought, the parties represented but not appearing of record, are as much interested in and bound by the determination of the suit as they would be if named and brought upon the record. May they not, then, take part in the trial and be heard in the production of witnesses and the advocacy of their rights? To deny them this would seem to be a denial of justice, and how may they avail themselves of these rights except by having their names entered on the record and their relation to the issue brought to the attention of the court? These cross petitions are criticized as multiplying and confusing the issues and involving defendants in the necessity of filing a thousand or more answers, if each subscriber to the fund is permitted to intervene and he sees fit to avail himself of the privilege. This, if true, is no valid objection, unless some right of the defendants is violated. One who contracts with a thousand may involve himself with them in complicated situations, but if so, the embarrassment results from the complicated contractual relations he has voluntarily assumed. This embarrassment can be overcome, but the denial of a right to intervene in a suit which is binding upon a party is insurmountable. But, in fact, the embarrassment complained of in this case does not exist. No new issue is tendered by any of the cross petitioners, and no answer to their pleadings is required. They simply join in the prayer of the petition, and thereby align themselves on the side of the plaintiffs in the controversy. It therefore follows that the motions to strike off the intervening cross petitions should be overruled.

The plaintiffs move to strike out of the first defense the allegation that "plaintiffs have brought the action without authority from the several subscribers of the fund and without their knowledge or consent." If authorization or consent is necessary to the maintenance of this action by the plaintiffs, then this allegation is relevant, otherwise not. The authority is given by the statute or it does not exist, for parties cannot invest others with the right to sue for them except by clothing them with an interest or a trust, and in that case the right to sue grows out of the rights so vested and not by direction or consent subsequently given. If these defendants have any defense in bar or otherwise to the claims of any or all of the subscribers to the fund, they may plead the same; but the allegation that the plaintiffs were not given authority to bring suit raises no issue. Motion to strike out is sustained.

Plaintiffs move for an order requiring defendants to make more definite and certain the allegations of the second defense by stating

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the period in the manufacturing season of 1902-3 that the factory was operated and during what months and for what part of the season 1904 the factory was operated by the Ohio Bottling Company. The defendants concede the propriety of this motion. It will, therefore, be granted.

The plaintiffs move with six specifications as to the third defense, and at the same time demur to it on the ground that it does not constitute a defense to the plaintiff's cause of action. If the demurrer is well taken, the motion needs no consideration. It will therefore be considered first.

This defense sets forth the claim that the plaintiffs represented "that said proposed site was and would be entirely safe from all flood or overflow from said stream." This seems to be more than the expression of an opinion and to amount to the statement of a fact. The fact stated is that this land does not overflow from the high water of Killbuck creek.

"Where a person, by means of false representations of facts materially affecting the identity and value of certain real estate, induces another to enter into a contract for the purchase thereof, upon the faith of such representations and upon which he was justified in relying, the purchaser may, in an action brought by the vendor for the purchase price, recoup the damages which he has sustained by reason of such false representations, although the vendor believed them to be true when made, and had good reason for so believing." *Mulvey v. King*, 39 Ohio St. 491.

This rule is fixed between vendor and vendee, but we see no reason why it may not be extended to parties in the present relation. The rule thus stated is most favorable for the protection of those induced to enter into contracts through representations which are false. On authority of this case, fraudulent intent in making the misrepresentation as to "facts materially affecting the identity and value" of the property need not be alleged, but it is necessary to allege that the representation was false. This is not done unless the statement that the factory was flooded from the high water of said stream a year afterwards amounts to such allegation. If the stream had never overflowed this factory site up to the time that the representation was made, then it was true when made, and the subsequent overflow would not make it false. Therefore, to state that it overflowed a year later, does not challenge the truth of the representation alleged to have been made. The allegations taken together state a misfortune rather than a misrepresentation. They fail to charge either false representation or false warranty.

These defendants also allege that it was necessary for the successful operation of the factory for the defendants to employ a large number of boys because of the cost of adult labor in such work, making it.

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impossible to operate the same with such labor at a profit; that the plaintiffs and the board of trade were aware of this fact and that it would be necessary for the defendants to employ a large number of boys in the operation of the proposed factory at the time defendants were solicited to locate the factory in Wooster, but after having prevailed upon them to locate a factory in the town, they urged the citizens of the town not to permit their boys to enter into defendants' employ in said factory, by the use of public statements and by articles published in the public press stating that it was not proper for boys to work in a factory where beer bottles were manufactured; that these statements and utterances were made generally by members of the board of trade and by a large number of the leading citizens of said city and by many persons claimed to be represented by plaintiffs in this suit, and that these statements and utterances stirred up and created such a feeling of hostility against the defendants and said factory in the community as deterred parents from permitting their boys from entering the said employment, so that the defendants were unable to procure boys to do the work customarily performed by boys in such factory and were compelled to employ men to do the work of boys at more than twice the cost, entailing great loss on defendants and making it impossible to operate the factory at a profit. They further say that by reason of this hostility stirred up by the citizens of the town and persons represented by plaintiff, together with the damage done to the factory by the flood, they suffered a loss amounting to more than \$20,000; that they were unable to go forward with the enterprise, and, to save themselves from still greater loss, were compelled to, and did, in September, 1904, sell the factory to the Ohio Bottling Company, and they allege a loss by reason of the premises of more than \$35,000.

The principle of law invoked by defendants is aptly stated in *Taylor v. Risley*, 28 Hun (N. Y.) 141:

"The law will not permit a party who has become entitled to the performance of an agreement by another to intervene so as to prevent such performance being made, and then, on the basis of such failure, to claim damages against the party because of his omission to perform his agreement."

The above rule unquestionably states the law and in apt terms, but the difficulty presented here is in its application to the case at bar. Are the plaintiffs here charged with interfering with defendants' performance of the contract? Certainly, third parties might urge the impropriety of boys or adults engaging in the manufacture of beer bottles or any other article of manufacture if they saw fit. The doctrine applying to labor conspiracies is not applicable to this controversy since conspiracy is not charged. The cases applicable thereto will not, therefore, be considered. The interference, if it is alleged to exist at all, is by reason of a contract relation having been assumed and violated, to

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the defendants' damage. The case last above named involved the charge of interfering with the defendant's performance of his contract to deliver a certain quantity of yellow pine timber to plaintiff at Brooklyn, New York, on or before a fixed time. The defendant alleged in his answer his inability to get the timber at the usual southern ports because of the yellow fever epidemic, but that he entered into negotiations with one Bacon of Savannah, Ga., for the purchase of the requisite lumber, and would have succeeded in purchasing and delivering it but for the interference of plaintiff, who, learning that defendant was negotiating with Bacon for the lumber, for the purpose of preventing defendant from purchasing it, induced Bacon to decline and refuse to sell it to defendant, whereby he was unable to deliver any portion of the lumber to plaintiff as he had agreed to do. Taylor's interference was by negotiating the purchase of the lumber himself with knowledge that Risley was negotiating for it, and the answer charged him with doing it so as to prevent the defendant from purchasing and performing his contract. "*Held*, that the facts stated in the answer would, if proved, have defeated the action and that the court erred in refusing to allow the defense to prove them." Taylor's interference was not alone in negotiating for the lumber, but for doing it for the purpose of preventing the defendant from performing his contract. It was in fact the act of the plaintiff which caused the breach and not that of the defendant.

Barker, J., dissenting, says:

"The defendant seeks to be relieved from a performance of his contract, because the plaintiff interfered with its execution as set forth in his third answer. It is not pretended that the plaintiff has done, or omitted to do, any act which is in violation of any of the terms of the contract, either express or implied.

"In support of his argument on this question he relies on the general precept of the law, which is applicable to all cases whatever, that a promisor will be discharged from all liability when the nonperformance of his obligation is caused by the act or fault of the other contracting party.

"This proposition would be available to the defendant as a defense to a recovery, if the plaintiff has done any act of an unlawful or wrongful character which is actionable in and of itself, having the direct and natural effect of preventing or interfering with the performance of the contract on the part of the defendant, such as destroying lumber belonging to the defendant suitable to be delivered under the contract, and intended so to be, or destroying the mills at which the timber was to be manufactured, or the vessels in which it was designed to transport the same. Such acts and interferences

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on the part of the plaintiff would prevent him from maintaining an action based upon the defendant's nonperformance.

"But mere misbehavior on the part of the plaintiff, and censurable conduct, not wrongful and actionable in the eyes of the law, and which among fair-minded men is regarded as an interference in the business of others, exhibiting ill-feeling and indicating an unfriendly spirit, cannot be inquired into, and made an excuse for the nonperformance of the engagements of the contracting party so disturbed and annoyed. Such we regard to be the nature and character of the plaintiff's acts of interference as set forth in the answer, and which the defendant offered to prove. For aught that was averred, the things said and done were truthful and proper things for plaintiff to say and do under the circumstances.

"It is averred that the plaintiff did interfere with the making and concluding of a bargain between the defendant and Bacon, the lumber merchant of Savannah, with the intention on his part of preventing the defendant's being able to execute his contract and deliver the lumber as agreed. This would not constitute a defense, unless the act of interference was such as could be denominated wrongful and actionable in law. For the plaintiff could, without furnishing an excuse to the defendant, for nonperforming his contract, have entered the market in Savannah and negotiated with lumber merchants for the same material that the plaintiff contemplated purchasing, and conclude a bargain in his own behalf, although his intentions were to annoy and prevent the defendant from executing the contract, yet it would not relieve him from that obligation."

The court based the decision of this case on the right of one contracting party to be free in performing the contract from the malicious or wanton interference or annoyance of the other party. The dissenting opinion makes the wrongfulness of the act the test of interference.

"An act legal in itself and which violates no right cannot be made actionable on account of the motive which induced it." *Chatfield v. Wilson*, 28 Vt. 49.

"An act which does not of itself amount to a legal wrong cannot be made so by a bad motive." *Chambers v. Baldwin*, 91 Ky. 121 [15 S. W. Rep. 663; 11 L. R. A. 545; 34 Am. St. Rep. 165].

In *Frazier v. Brown*, 12 Ohio St. 294, the cause of action stated was diversion, with malicious intent, by the defendant of subterraneous water on his own land from adjoining land of the plaintiff; but it was held there could be no recovery, because, as said by the court, page 312, "the act done, to wit, the using of one's own property, being lawful in itself, the motive with which it is done—whatever it may be as a matter of conscience—is, in law, a matter of indifference."

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Boynton, J., in *Pitts. Ft. W. & C. Ry. v. Bingham*, 29 Ohio St. 364, 369 [23 Am. St. Rep. 751], says:

"Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong."

In *Letts v. Kessler*, 54 Ohio St. 73 [42 N. E. Rep. 765; 40 L. R. A. 177], the question was as to liability for maintaining a "spite fence" from motive of unminged malice. Says Burkett, J., on page 81:

"In effect he has the right to shut off the light and air from her windows by a building on his own premises, and she is not in effect concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be ripened into a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so, would not be enforcing a right of property, but a rule of morals."

The principle underlying these cases seems to be that an act not violative of any contract provision cannot be a wrongful interference with the performance of the contract unless it is unlawful in the sense of being in excess of one's legal rights. In other words, an act not wrongful in and of itself and not in violation of the terms of the contract express or implied, furnishes no excuse for its nonperformance even though such act may embarrass performance by the other party. As to what constitutes an unlawful act in this relation the authorities are not in accord. Some hold that an act otherwise innocent becomes wrongful when done with a purpose to cause the other party to default in performing the contract if damage results. Others deny that the motive can give character to the act. As said in *Jenkins v. Fowler*, 24 Pa. St. 308:

"Malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful."

The court inclines to the latter view, but it is not necessary to decide this point, since the answer does not allege any act done by the plaintiffs from evil motive or purpose to bring the defendants into default in performing the contract.

Did the acts complained of violate any of the terms of the contract? They did not, unless a promise not to interfere with the labor market for boys' labor in Wooster, to defendant's injury, is implied.

In *United States v. Peck*, 102 U. S. 64 [26 L. Ed. 46], the claimant entered into a contract with the proper military officer to furnish and deliver a certain quantity of wood and hay to the military station at

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Tongue river in the Yellowstone region, on or before a specified date. He furnished the wood, but failed to furnish the hay, which was furnished by other parties at an increased expense. The accounting officer claimed the right to deduct from the claimant's wood account the increased cost of the hay. The court, upon an examination of the contract and attending circumstances, were of opinion that the parties contemplated the hay to be cut at the Big Meadows in the Yellowstone valley, near the mouth of Tongue river, which was, indeed, the only hay plaintiffs could have procured within hundreds of miles, and which it was known he relied on. The government officers, feeling that the claimant would not be able to carry out his contract, had allowed other parties to cut this hay, whereby Peck was unable to perform his contract and failed to deliver the hay. Justice Bradley, on page 65, says:

"We think that the facts of the case clearly bring it within the rule allowing the introduction of parol evidence; first, for the purpose of showing, by the surrounding circumstances the subject-matter of the contract, namely: hay to be cut and gathered in the region where it was to be delivered; secondly, for the purpose of showing the conduct of the agents of the defendant by which the claimant was encouraged and led on to rely on a particular means of fulfilling his contract until it was too late to perform it in any other way; and then was prevented by these agents themselves from employing those means. The supply of hay which he depended on, and which under the circumstances he had a right to depend on, was taken away by the defendants themselves. In other words, the defendants prevented and hindered the claimant from performing his part of the contract."

This case is authority for the proposition that parol evidence is admissible to show that the parties contracted with reference to performance from certain sources of material or the employment of certain means to that end called the subject-matter of the contract, and that interference with such means, if it prevents performance, is a breach of an implied term of the contract, and any damage resulting from the nonperformance flows from the act of interference and not from the failure of the one thus interfered with. This doctrine is of frequent application and needs no citation of authorities to support it. The scope of its application is not defined in any of the cases brought to the attention of the court. But no case is cited and research has failed to disclose any case where interference with the subject-matter of the contract has been extended to a situation like the one at bar. If these plaintiffs bound themselves not to interfere with the labor market of Wooster, it is difficult to see why they might not also have contracted away the right to interfere with the market in Wooster for the sale and distribution of the product the defendants contemplated making, had such market been the inducement to the location of the

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factory there, and so have fostered a monopoly with legal sanction. Would it have been an interference with defendants' rights had the board of trade encouraged the location of other factories employing boys' labor and resulting therefrom in embarrassing these defendants in finding sufficient cheap labor in Wooster? This membership of the board represents a considerable part of the population of this small city. Had they contracted away the right to direct their own sons into other channels of employment? Did they, in entering into this contract, intend to abridge their right to promote by word and act policies believed to advance the public welfare or morals? Would their encouragement of legal prohibition of the liquor traffic be a violation of this contract if it resulted in the destruction of the market for beer bottles? These and other considerations forbid our applying any different rule to the conduct of the plaintiffs in determining the question as to their liability than the one which would be applied to strangers to the contract; and since conspiracy to injure the plaintiffs in their rights of property is not charged, the allegations of fact under consideration do not bring these defendants within any recognized legal principle.

There remains for consideration the allegation making the second defense a part of this one by reference. May a defense be repeated by reference to it and making it a part of another defense and thereby place such other defense, which is defective, beyond the reach of demurrer? Of this there is doubt, but the matter which is made a part of this defense by reference amounts only to the charge that plaintiffs did not pay their subscription when due and payable, and consequently are barred of the right to recover upon the contract. The allegations of the petition which are not denied are to be treated as confessed. Among these is one stating that defendants waived strict performance of the contract by receiving payments after all of them were due and payable until all of the subscriptions were paid excepting the sum of \$1,500. It is an elementary principle that time of performance, including the time of making payments, is waived by accepting payments after they are due and payable, and when waived, the failure to pay is not available to defeat an action on that account.

See Page, Contracts Sec. 1502, on waiver of provision as to time of performance.

For the reasons stated, the demurrer is sustained.

The motion with its six specifications need not be considered.

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CONTEMPT OF COURT.

[Summit Common Pleas, October 15, 1908.]

IN RE APPLICATION OF DANIEL P. STEIN.

**MAYOR HAS NO JURISDICTION TO COMMIT FOR CONTEMPT OF COURT WITHOUT CHARGES
PREFERRED.**

The mayor of Akron, Ohio, while acting as an examining magistrate, having issued a warrant by virtue of which certain persons were arrested charged with murder, verbally ordered the sheriff of Summit county, in whose custody said persons were, to bring them or permit them to be brought before said mayor that they might be given a hearing, and upon the sheriff's refusal to comply with the order, the mayor then and there without making a charge in contempt either verbally or in writing, adjudged the sheriff guilty of contempt and sentenced him to be confined in the jail of the county until he should comply with said order and purge himself of said contempt or be otherwise discharged by due process of law. *Held*: There having been no charge of contempt made, either verbal or written, the mayor was without jurisdiction to make said order of commitment.

[Syllabus by the court.]

HABEAS CORPUS.

Grant, Seiber & Mather, for petitioner.

Rogers, Rowley & Rockwell, G. M. Anderson and Philo & Kennedy, for respondent, the mayor.

H. M. Hagelbarger, prosecuting attorney, for respondent, the coroner.

WASHBURN, J.

By virtue of a warrant issued by the mayor of the city of Akron, Ohio, Ralph Brehm and John Giffin were arrested by the police of the city and brought before said mayor on a charge of murder, and later said prisoners were taken to the jail of the county and placed in the charge of Daniel P. Stein, sheriff of the county, to be safely kept pending a hearing before said mayor. That was in the morning, and at one o'clock of the same day the mayor issued an order to the chief of police commanding him to receive said prisoners and bring them before the mayor for hearing on said charge. The deputy sheriff who had charge of the jail declined to deliver the prisoners to the chief of police, and thereupon the mayor cited the sheriff to appear and show cause why he should not be punished for contempt.

In obedience to said citation the sheriff appeared before the mayor and at his request the mayor granted a continuance of the contempt proceeding until the following day to enable the sheriff to prepare and make defense thereto.

Immediately after said continuance the mayor verbally directed and ordered said sheriff to surrender the bodies of said prisoners to the chief of police so that they might be brought into court that a hearing might be had, and demanded that the sheriff answer whether or not he would comply with the order. The sheriff's answer, if we

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confine ourselves to the competent evidence introduced at this hearing, was a refusal, although if we were to consider the undisputed, but, as we think, incompetent evidence of just what was said and done by the sheriff at that time, it is very doubtful whether he really and in a legal sense refused. Thereupon the mayor found the sheriff guilty of contempt and sentenced him to be confined in the jail of the county until he complied with said verbal order or was discharged according to law. The commitment was issued to the coroner, who confined the sheriff in the jail of the county, and soon thereafter the sheriff began this proceeding in habeas corpus to obtain his discharge.

The charge for which the sheriff was cited to appear before the mayor had been regularly continued until the following day, and the commitment of the sheriff was based solely upon said verbal order which was made immediately after said continuance and which was not at any time reduced to writing or entered upon the docket of the mayor. He did enter upon his docket the statement that he had made a verbal order, but the order itself was never made otherwise than verbally.

The record of the mayor shows that after making the verbal order he "asked" the sheriff if he would comply with the same; that he refused and showed no good and sufficient cause or reason for his refusal, *but no charge of contempt was made, either verbally or in writing*, and the record does not show that any hearing was had or opportunity given for a hearing and as a matter of fact no opportunity was given for a hearing and no hearing was had. But this fact, although undisputed, does not affirmatively appear from the record and has been treated by me as not being a jurisdictional matter which can be taken advantage of in a habeas corpus proceeding.

The warrant of commitment does not contain a transcript of the entry of conviction on the mayor's docket (for the reason, as was stated at the hearing, that the warrant of commitment was issued before the docket was prepared), so the docket must be considered as the proper and best evidence of what was done by the mayor.

The docket, after reciting the continuance of the original contempt proceedings, states that thereupon the mayor informed the sheriff that said prisoners had been left in his custody and that the mayor had ordered and directed that the said prisoners be brought into court, and proceeds as follows:

"And I, William T. Sawyer, as mayor of the city of Akron, thereupon stated to said Daniel P. Stein as such sheriff that I was now ready to proceed with said hearing and directed him to surrender the bodies of said defendants Ralph Brehm and John Giffin to John Durkin as chief of police, so that they might be brought into court and said hearing proceeded with, and asked him if he would so do, which request and order the said Daniel P. Stein declined to comply

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with and refused to permit said defendants to be brought before me as mayor or to surrender them to the custody of John Durkin as chief of police so that they might be brought before me as such mayor pursuant to said order, and he the said sheriff refused to bring said prisoners himself or by deputy before me so that said preliminary hearing might be proceeded with, all of which proceedings aforesaid were had and conducted in open court before me as mayor of the city of Akron. Thereupon the said Daniel P. Stein showing no good and sufficient cause or reasonable excuse for his refusal to comply with my order and command as aforesaid, I find him guilty of contempt of this court in so refusing to comply with said order and request. It is therefore ordered, considered and adjudged by me, William T. Sawyer, as mayor of the city of Akron aforesaid, that said Daniel P. Stein be and hereby is committed to the jail of the county in charge of Harry S. Davidson, the coroner of said county, there to be confined until he shall comply with said order and request and until he shall have purged himself of his said contempt or shall be otherwise discharged by due process of law, and that he pay the costs of this proceeding taxed herein at ——."

It is well settled that this court in this proceeding can consider no errors which appear in this record, except such as show a lack of jurisdiction in the mayor to make the order of commitment under which the sheriff is restrained of his liberty.

It is contended on behalf of the mayor that he has jurisdiction to summarily punish for contempt under the circumstances shown in this record, and that he has that jurisdiction, independent of the legislature of the state of Ohio, as an authority inherent in a court and in support of that proposition attention is called to *Hale v. State*, 55 Ohio St. 210 [45 N. E. Rep. 199; 36 L. R. A. 255; 60 Am. St. Rep. 691], where the Supreme Court having a case involving a court of record before it lays down the broad proposition that courts created by the constitution have power to punish for contempt by virtue of the constitution and not by virtue of any act of the legislature, and that such power not being conferred by the legislature cannot be taken away or abridged by it, and it is claimed that justice of the peace courts, being constitutional courts, have this inherent power to punish for contempt and that the legislature, by Sec. 1844 (Lan. 3378; B. 1536-791) Rev. Stat. having conferred upon mayors the "like power to punish contempts * * * as is or may be conferred on justices of the peace," therefore the mayor had jurisdiction to punish for contempt in this case, summarily, without written charges being filed.

In *Hale v. State*, *supra*, the court was considering a case involving the power of a court of record, and the language used must be construed in the light of the decision of the same court in *DeCamp v. Archibald*, 50 Ohio St. 618 [35 N. E. Rep. 1056; 40 Am. St. Rep. 692],

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where the court seems to assume that a justice of the peace has only such authority in contempt as is conferred by statute. Then, too, it has been held that in the absence of legislative authority inferior courts have no power to punish for contempt. *Kerrigan, In re*, 33 N. J. L. 344; 9 Cyc. 28. That proposition is certainly true as to all contempts except those committed in the immediate presence of the court which obstruct its proceedings. *Cooper, In re*, 32 Vt. 253.

But conceding that justices of the peace have inherent authority in Ohio independent of statute to punish for contempt, it does not follow that mayors have like authority. The mayor's court is not a constitutional court, but is a creature of the statute, and as to such courts the legislature had authority to confer such jurisdiction to punish for contempt as it deemed wise. *Nichols v. Judge*, 130 Mich. 187 [89 N. W. Rep. 691]. What jurisdiction in contempt did the legislature intend to confer by Sec. 1844?

It will be noted that the legislature evidently thinking that it had authority to confer or withhold jurisdiction to punish in contempt from justices of the peace, conferred such authority upon justices of the peace in certain cases "and no others" by Sec. 605 Rev. Stat. Later it conferred upon mayors "like power to punish contempts * * * as is or may be conferred on justices of the peace."

It seems to me plain that when the legislature created the mayor's court and conferred such jurisdiction in contempt as was conferred upon justices of the peace, it intended to confer such authority as the legislature had theretofore conferred upon justices of the peace, and not such authority as justices of the peace might have by virtue of their being constitutional courts, if they have any authority in contempt by virtue of the constitution alone.

On the whole, my judgment is that the mayor in this case had jurisdiction to punish for contempt under the statutes on that subject relating to justices of the peace, and that only.

But conceding that the mayor had jurisdiction independent of the statute to punish for contempt committed in his immediate presence which obstructed the proceedings of the court, still the claim of the sheriff is that he had no jurisdiction to punish him in this case without first having charged him with contempt, because the statute governing contempt proceedings before justices of the peace, as well as those governing contempts in courts of record (Sec. 5639 Rev. Stat. *et seq.*) requires a charge to be made and an opportunity to be heard in defense to be given.

"While courts do not derive their power to punish for contempt from any statute, it is their duty to conform to a statute which does not abridge this power but simply points out the manner in which it shall be exercised." *Morris, Ex parte*, 28 O. C. C. 611 (8 N. S. 212).

So that if the statutes when fairly construed required charges to

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be filed in cases such as the mayor had before him and no charges were filed, then he did not have jurisdiction to imprison the sheriff.

The procedure for justices of the peace under Section 605 for contempts committed in the presence of the justices of the peace, as laid down in Swan's Treatise 535, provides for written charges.

The statute governing justices of the peace in contempt proceedings provides that "an opportunity to be heard in his defense or excuse must be given," clearly contemplating that some kind of a charge must be made, for how can one defend until there is some charge to defend against? Even in courts of record the law requires charges to be filed in all cases except for "misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice."

In the case at bar no charge of contempt was made, either verbally or in writing. The sheriff was merely ordered to deliver the prisoners, and upon his refusal was then and there, without any accusation or charge of any kind, adjudged to be in contempt and sentenced.

The case is a peculiarly apt illustration of the wisdom of the law in providing for the making of charges and giving the accused an opportunity to be heard and the court an opportunity for cool and calm judgment. The sheriff, a public officer with no interest in the controversy except to do his duty, was hastily imprisoned in the jail of which he was the keeper without being even verbally charged with contempt.

It is doubtful whether such procedure would be lawful even in a court of record, for it has recently been held by the circuit court that although no charges were required to be filed in cases where there was misbehavior in the presence of the court which obstructed the administration of justice, still an officer of the common pleas court who in open court was verbally ordered to do a certain thing and although being warned that it would be contempt of court to refuse, did refuse, and was then and there, without any charges being filed, found guilty of contempt, could not legally be imprisoned for contempt of court, for the reason that his refusal was not within the meaning of the statute, misbehavior which obstructed the administration of justice, and that therefore he was entitled to have charges filed and have an opportunity to be heard. *Morris, Ex parte, supra*. And in this case it was specifically decided that the failure to prefer written charges in a case quite similar to the one at bar was a jurisdictional matter and when that fact appeared by competent evidence in a habeas corpus proceeding, relief could be granted.

In the case at bar it appears from the mayor's docket that no charge of contempt was made, not even an oral one. Therefore the mayor was without jurisdiction to imprison the sheriff and the prayer of the petition for his release will be granted.

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**CONTRACTS—DEDICATION—MUNICIPAL CORPORATIONS—
RAILROADS—RIPARIAN RIGHTS.**

[Cuyahoga Common Pleas, February 18, 1909.]

CLEVELAND V. CLEVELAND, C. C. & ST. L. RY.**1. EJECTMENT LIES TO RECOVER POSSESSION OF LANDS NOTWITHSTANDING EASEMENT FOR CERTAIN PURPOSES.**

A city may maintain an action against a railway company under Sec. 5781 Rev. Stat. to recover possession of land of which the former has the paramount title and the latter an easement for certain purposes therein.

2. FACTS CONSTITUTING DEDICATION.

A strip of land occupied by a street and public place since 1796 down to the recording of a town plat in which it was located as a street in 1800 and continuing to be so used until 1814 when the town was incorporated as a village by act of the legislature making reference to such plat and so used in 1836 when the village became incorporated as a city, if not a statutory dedication thereof, becomes dedicated as such at common law.

3. CORPORATION FOR PARTICULAR PURPOSE DISSOLVED UPON COMPLETION OF ITS BUSINESS.

The Connecticut Land Company was a corporation for the particular purpose of disposing of the lands of the Connecticut Western Reserve, and, having completed its business and adjourned *sine die* in 1809, it will be presumed that such company was dissolved and that neither its stockholders nor their successors retained any interest in such lands, especially, as to a certain irregular strip of sandy land then of no particular worth between a lake and high bluff upon which such company had platted a town, which strip they dedicated as a street thereof and which was the only access afforded the inhabitants of such town to the lake beach.

4. STATUTE OF LIMITATIONS RUNS AGAINST MUNICIPALITIES.

The statute of limitations runs against municipalities where the adverse occupation is by permanent structures excluding the public. Hence, if railway companies occupied openly, adversely and exclusively a strip of land dedicated as a street with their tracks, buildings, etc., recognizing no title except that of their own from 1849 to 1893, they would obtain a complete and absolute title to such land.

5. DIVERSION OF LANDS DEDICATED TO PUBLIC USES NOT INDICATING ABANDONMENT.

The city of Cleveland by its incorporating act in 1836, having been given authority to mark the boundaries of its streets; by act of 1837 (35 O. L. 65), a way to vacate its public places and streets; and by special act in 1844 (43 O. L. 3) having obtained express power to utilize a lake front strip, dedicated as a street, for other purposes, does not abandon the strip by such diversion of its uses so as to give railway companies occupying part thereof with tracks, etc., title by abandonment, especially since, instead of permitting such railway companies to appropriate rights therein, the city entered into a contract granting the use of such lands for railway purposes, but reserving some control thereof.

6. APPROPRIATION PROCEEDINGS TO QUIET CLAIMS OF THIRD PARTIES NOT BINDING ON PARTY UNDER WHICH RAILWAYS HOLD POSSESSION.

Appropriation proceedings, instituted by railway companies occupying, as a right of way under contract with a city, a strip of land dedicated by the Connecticut Land Company as a street, against certain alleged claims of title by successors of the original grantors, to which the city was not made a party, do not bind the city; neither upon the claim that the city was an unknown party, because it was a known party and as against such claims the railways claimed title and possession from the city; nor upon the ground of color of title at the time of the contract with the city for

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such right of way, as both railway companies and city regarded the latter, as being the owner and occupier of such lands.

7. CONTRACT AMBIGUOUS AS TO TITLE GRANTED CONSTRUED AGAINST GRANTEE.

A contract, ambiguous as to title granted, for a right of way for tracks, depots, etc., necessary for the operation of railways, over land owned by a rapidly growing city, located at the confluence of a large navigable lake and river made accessible to shipping by government improvements, and valuable because of its natural terminal facilities to railways and shipping interests, will not be construed as bartering away all access to the lake especially where such advantages were known and in partial realization at the time, and with the anticipation of future benefits imminent. The mere fact that the city might have had power to grant away such rights cannot control.

8. CONSTRUCTION OF CONTRACT AT TIME OF MAKING CONTROLS AFTER LONG LAPSE OF TIME.

Railway companies, for several years and in litigation with other parties claiming adversely to them having construed their occupation, under contract with a city for a right of way over certain lands dedicated to public uses, as that of a licensee of, and recognized the paramount right in, the city, cannot more than fifty years later claim title to such lands by adverse possession.

[Syllabus approved by the court.]

James Lawrence, N. D. Baker, city solicitor, and D. E. Morgan, for plaintiff.

E. A. Foote, for Clev. C. C. & St. L. Ry.

F. S. McGowan, for Lake Shore & M. S. Ry.

W. B. Sanders, W. C. Boyle and C. T. Brooks, for the Pennsylvania Co. and Cleveland & Pitts. Ry.

VICKERY, J.

I approach the decision in this case with considerable hesitancy, as the interests involved are so great and the questions of law are so complicated, and for that reason I have taken more time than I would ordinarily take in deciding a case. I wish to thank the counsel in the case for the manner in which they have presented it to the court; their work has made the work of the court much less. I am not only hampered by the complications in the case itself, but it has been twice decided already by two very able courts,—one, the United States circuit court, in *Cleveland v. Railway*, 12 O. F. D. 459 [93 Fed. Rep. 113], the other, the United States circuit court of appeals, in *Cleveland v. Railway*, 15 O. F. D. 393 [147 Fed. Rep. 171; 77 C. C. A. 467], and after able opinions by each court it was remanded to this court for retrial, where it originally started in 1893. The United States courts having no jurisdiction, consequently, their opinions however valuable they may be, are not binding upon anybody only so far as the reason of the able lawyers must appeal to another lawyer in reviewing the same facts.

It was said to me by a prominent lawyer of this bar, in no wise connected with this case, and in a no-offensive sense, that a common

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pleas judge would have his nerve with him, if he dared to decide this case for the plaintiff after two United States courts had decided it for the defendants. Be that as it may, it would be much easier for this court if he could bring himself to follow the reasons of the two courts who have already passed upon this question. But, with all due respect to the two able courts who have already passed upon it, I cannot bring myself to agree with their conclusions. I have no hesitancy in saying that, from a somewhat careful review of the record and the authorities, a decision could be rendered in favor of the defendants, based upon a much more logical and consistent theory than either of those adopted by the two able courts above referred to. Indeed Judge Hammond, in basing his decision for the defendants on the ground of appropriation, calls forth a remark from the reviewing court that such a position is not tenable; and they base their decision upon the ground that it was admitted by the pleadings that the defendants had some rights in the street, and, therefore, action in ejectment would not lie, because action in ejectment is possessory action alone, and unless possession could be given to the plaintiff, however weak the title to the property of the defendants might be, the plaintiff was not entitled to maintain its action. To arrive at this conclusion it was necessary for the learned circuit court of appeals to eliminate some Supreme Court decisions of the state of Ohio, and to finally say then that the United States court would not be bound to follow the decisions of the Supreme Court of the state. While that might be true so far as the United States circuit court of appeals is concerned, it certainly would not obtain with a court of common pleas: it would be bound by the decisions of the Supreme Court of the state. So, the decisions of the United States circuit court and circuit court of appeals can both be eliminated from the subsequent discussion only so far as they aid in reaching a decision; and it will be the duty of this court to take up this case as if it had never been transferred to the United States court. And so, we will go back to the beginning.

This suit is brought under Sec. 5781 Rev. Stat., which takes the place of the old common law action in ejectment, that was done away with when the Ohio code took effect, July 1, 1853. And it is brought to recover possession of the property known as "Bath street property," and being all that property lying north of the south line of Front street to the Lake, bounded on the west by the government pier and the Cuyahoga river, and on the east by the west line of Water street and the west line of Water street projected. Plaintiff alleging in its petition that it is entitled to the possession of the property described in the petition, which has been designated as the "Bath street property," and that the defendant company unlawfully keeps plaintiff out of the possession. The various defendants file answers, admitting that they have possession of the property in question, and denying that plaintiff has any title in.

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or right to the same. They admit that their possession is exclusive, which, in legal effect, amounts to an ouster. They then set up several affirmative defenses; first, that they had had possession of the land for more than twenty-one years before the commencement of this action, and are entitled to the exclusive right to use the same; whereby it is alleged this action is barred by the statute of limitations. Second, defendants also claim that plaintiff is estopped from maintaining this action by permitting the defendants to occupy said lands and to expend large sums of money on the same and in the vicinity thereof. And for a third affirmative defense, the amended answer of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and answers substantially to the same effect by the other defendants are filed, in which they say that on September 13, 1849, said plaintiff for the benefit of commerce of the city of Cleveland and its inhabitants, and to furnish to the defendants ground bordering on the lake necessary for carrying on such commerce, and to provide for an interchange of business with each other, an agreement was entered into whereby F. W. Bingham, then mayor of said city, duly authorized by resolution of the city council, executed and delivered to the Clev. C. & C. Ry., the predecessor of the Clev. C. C. & St. L. Ry., the deed or contract by which, in consideration of the sum of \$15,000 in the capital stock of the said company, for which a certificate was issued to said city by said railway company, and for other considerations named in said instrument, the said city granted to the said railway company as fully and absolutely as said city, through the authorities thereof who had the power and legal authority so to do, the right to a full and perpetual use of their railway tracks, turn-outs, engines, cars and passenger houses, turntables, water tanks, with stations and avenues to and from the same, and all other appurtenances connected with the necessary use and working of said railway, and all the real estate described in the petition. By virtue of said contract, said railway company entered into possession of said property, laid tracks and other construction necessary to carry on its business; made valuable improvements thereon; and afterwards, it admits, that other railway companies entered into the occupancy and possession of said ground, and no effort was made by said plaintiff to return said stock at the consideration so mentioned in said contract.

Plaintiff replies to the several answers of the defendants, and takes issue with the affirmative defenses set up by the defendants. And in respect to the legal effect of said contract of September 13, 1849, with the character of the possession by the defendants of the premises in controversy,—plaintiff admits the execution of the contract of September 13, 1849, by the then officers of the city of Cleveland, and the receipt and retention by it of the consideration therein mentioned. It denies the legal effect claimed for said instrument, and denies that either of them

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were, by the laws of the state of Ohio, then in force in the city of Cleveland, or that its officers had authority to grant exclusive rights to the lands embraced in said streets or the additions thereto.

So, the issue to be determined is, who is entitled to the possession of the land in question? That raises several questions. I will dispose of them in their order. It seems that the Connecticut Land Company, in about 1796, laid out the town of Cleveland by their surveyors, Pease and Porter, who furnished a map of their survey, the full notes of which and the original map being in evidence in this case; and the map shows in it "Bath street" as being all that part of the property in question which was north of lot 291 down to the lake; that portion which is west of the west line of Water street to the Cuyahoga river. It at that time was an irregular strip of land located between the bluff and the lake, and was a sandy strip extending to the westward, into a tongue of land projecting from the Bath street strip way off into the river. Subsequently, perhaps in 1826, the United States government had a channel cut across this strip, and a part of the land that was originally Bath street is now on the west side of the river, on Whisky Island, so-called.

The first question to be determined is, Did the city of Cleveland ever acquire title to Bath street, and if so, what title did they acquire in the street?

On December 6, 1800, the territorial legislature of Ohio passed an act to provide for the recording of town plats. Thereupon the Connecticut Land Company caused another plat and survey to be made by Amos Spofford, the surveyor. This plat and minutes and notes were duly recorded and has ever since been recognized by the land company and all claiming under it, as a correct plat of the village of Cleveland as laid off into roads, streets, alleys and public places.

It is worthy of note, that the only place access to the lake for the inhabitants of the proposed new village or town was over this strip of land, formerly Bath street. The western boundary of this proposed town was the Cuyahoga river; the northern boundary was the lake; the street farthest east was Erie street, and the street farthest south was Huron street, with Ohio street running into that from the southeast. The lots along Lake street butted on the lake, so that the only place that access to the lake was had was at the confluence of the Cuyahoga river with the lake, along this little sandy strip of land called Bath street.

It is hard to conceive that the founders of the city of Cleveland did not intend to have some point of the proposed city reach the lake. The fact that this street was called "Bath street" seems to be significant, as it was, undoubtedly, the only piece or strip of sandy beach suitable for bathing at that time, bordering upon the new city. And, undoubt-

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edly, it was the intention of the founders of the city of Cleveland to have Bath street extend from lot 291 to the low wave mark at the lake. It was thus planned on the plat of the Pease & Porter and again on the Spofford map of 1800. The making of this last map was probably to comply with the statutes, which statutes, 1 Chase's Stat. 291, provided, among other things, that "if the plat is acknowledged before some officer who was duly authorized to take acknowledgments, it at once placed the fee of the streets and alleys in the county, for the benefit of the public." This map was recorded in the records at the county seat of Trumbull county, of which Cuyahoga county was then a part. But it was never acknowledged. There can be no question but what this strip of land was occupied as a street and a public place from the time of the platting of the city by Pease & Porter, in 1796, down to the recording of the map of Amos Spofford in 1800, and was still occupied when the village of Cleveland was incorporated by an act of the legislature in 1814, which made special reference to the plat recorded in the recorder's office of Cuyahoga county. And there can be no question but this operated as and constituted an acceptance by the city of Cleveland, the then village of Cleveland, of this street, for street purposes. And there can be no question but that the people in the village of Cleveland occupied and used this street up to the incorporation of the city of Cleveland in 1836. It was recognized as a street by an act of the legislature in 1815, when the general assembly of the state of Ohio recognized the city plat by vacating a part of it. 13 O. L. 114.

Again, in 1837, the general assembly enacted, that all streets and alleys in towns which have, or may be laid out agreeable to all, shall be, and they are hereby dedicated public highways for every purpose whatever. Sec. 10 of the Act of March 20, 1837 (35 O. L. 65). Swan's Stat. (1841) 809.

So, I say, there can be no doubt but that this street was dedicated; if not a statutory dedication, there was a common law dedication, and when the city of Cleveland was incorporated in 1836 (34 O. L. 271), this was one of the streets or public places in said city and had been occupied as such without any question or claim from anybody to the contrary, down to 1836. Surely, if for no other reason, the statute of limitations would have given the people of the city of Cleveland absolute right to use this street for street and public purposes.

It seems that the title to the land in the Connecticut Western Reserve, of which Cuyahoga county and the city of Cleveland were a part, was in three trustees, and as early as 1809 proper proceedings had been had by the members of the Connecticut Land Company to divide up all their holdings and to wind up their business absolutely, as it was a corporation incorporated for a particular purpose, to wit, that of disposing of the land of the Connecticut Western Reserve, and for no other

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purpose; and when they had completed their business they had adjourned *sine die*. And it is safe to presume that they retained no interest to this strip of land, at least. And it may be safely said that if they ever had any title to this strip of land called Bath street, they would have lost it by abandonment. There can be no question but that the littoral proprietor is entitled to the accretions which may result, and which, in this case, did result from the building of the government pier along the Cuyahoga river; and the strip of land which, originally, was from sixty to three hundred feet in width had become very, very much wider in 1836. And it cannot be claimed that the Connecticut Land Company obtained title to any of these accretions, for they all belonged to the city of Cleveland by virtue of its having a street called Bath street, whether the dedication was statutory or was by common law.

The case of *Webb v. City of Demopolis*, 95 Ala. 116 [13 So. Rep. 289; 21 L. R. A. 62], is a very instructive case, and in many ways parallel with the case at bar, but particularly instructive on the question of dedication. So, I have no hesitancy in saying that the city of Cleveland had acquired all title in and to the strip of land in controversy prior to 1836, and that no one else had, or could have, any right or title to it by virtue of any deeds, or by inheritance from the trustees of the Connecticut Land Company, or their heirs at law of any of the parcels of the land embraced in the Connecticut Western Reserve. And, I think this title remained in the city, undisturbed and unassailable, down to the making of the contract of 1849, to which I will come subsequently.

The next question I will take up is: Is the nature of the city's interest and title in, and to, this strip of land such that they can maintain ejectment suit to recover possession? There could be no question about this, if they were claiming to absolutely oust the railway companies from possession. A great number of authorities are cited, many of which I have read, and it seems to be the overwhelming weight of authority that the city or municipality might maintain ejectment to recover possession of one of its streets, even though it is not seized of the fee. But the question arises whether that could be done, where, as in this case, the city admits that the railway companies had the right to occupy this strip of land for some purposes. I have not been able to learn just exactly how much the city admitted the railway companies have the right to occupy; but, I believe it is conceded that they have the right to occupy some portion, and that there is no attempt made in this action to completely oust the railway company in their occupancy. This makes it a little more difficult to decide whether or not ejectment will lie in favor of the city. It is claimed by counsel for the city that the city has the right to recover possession of the property, subject to the easement that the railway company may have to use the land for some

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purposes. And they seem to be borne out by the authorities on this proposition.

I must confess that I am at a loss to know just what form of judgment might be entered in this case, if a finding should be made in favor of the city and against the railway companies, holding that the city is entitled to a paramount title and the railway companies only to an easement.

As I have already said, this action is brought under Sec. 5781 Rev. Stat., and the admissions of defendants do away with the necessity of proof of an ouster, because they deny title in plaintiff and also the right of possession. *Grant v. Paddock*, 30 Or. 312 [47 Pac. Rep. 712].

Judge Dillon says a municipal corporation is entitled to the possession and control of streets and public places, and may, in its corporate name recover the same in ejectment. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such an action against the adjoining proprietor or whoever may wrongfully intrude upon the occupancy of the detained property. And where the adjoining proprietor retains the fee the courts can overcome the technical difficulty by regarding the rights to the possession, use and control of the property by the municipality as a legal and not a mere equitable right. 2 Dillon, *Municipalities* (4 ed.) Sec. 62.

Again, where a valid dedication of the street has been made either statutory or according to the common law, an action may be maintained by the proper municipal authorities to recover possession from the one who wrongfully withholds it. *Fulton v. Mehrenfeld*, 8 Ohio St. 440. Newell, *Ejectment* Sec. 20-21, and other cases. Also *St. Louis v. Railway*, 114 Mo. 13 [21 S. W. Rep. 202].

Judge Hammond, in this very action, *Cleveland v. Railway, supra*, page 117, where he distinguishes many of the cases cited by the defendants in this action, comes to the conclusion that ejectment will lie. I am constrained to hold with him upon this proposition, that the city could have the right to maintain ejectment of the land in controversy, subject to whatever rights the railway company may legally have in the tract of land, unless the city has parted with all of its title or is estopped by subsequent actions to reclaim the land. Whether the city has parted with its title or has estopped itself from setting up its title, I will take up subsequently.

The defendant company claims that they have occupied the land in controversy under a claim of ownership, absolutely and adversely, for a period of well nigh half a century, and that the statute limitations has run in their favor, and the city of Cleveland cannot, at this time, disturb them in their possession. That brings me to the question as to whether the statute of limitations runs against a municipality. And I want to say on this question that I have reviewed the authorities,

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and I believe the argument of Mr. McGowan on behalf of the Lake Shore road is absolutely unanswerable, and that the statute of limitations does run against a municipality as well as against anyone else. Beginning with the case of *Cincinnati v. Church*, 8 Ohio 298 [32 Am. Dec. 718], decided in 1838, down to very recently, there is an unbroken line of authorities, all of which are to the effect that the occupancy of the highways or common places by a structure which is permanent in its nature and of such a character that it would exclude the public from occupying that part of the highway and that it had existed for a period longer than the statute of limitations, to wit, twenty-one years, the public would have lost their right in and to that portion of the highway. I think the cases which seem to hold differently than that are easily distinguishable, and it does not destroy the doctrine laid down in Ohio. There has been cited the decision of Judge Caldwell of the circuit court of this circuit in *Wright v. Oberlin*, 13-23 O. C. C. 509 (3 N. S. 242). Not wishing to criticise or comment upon this case only to say that the circuit court in Lucas county, in the case of *Seese v. Mawnee*, 28 O. C. C. 768 (7 N. S. 497), reviewed the prior decisions of the Supreme Court and came to the conclusion that the statute of limitations does run against a municipal corporation, and they say that an entire exclusion of the public from the streets for a period of twenty-one years, (it makes no difference how frail or unsubstantial the barrier may be that excludes the public), that it is not necessary to exclude them by a permanent structure; it is sufficient that the public be excluded. And the court say:

"We think that this distinction was lost sight of by Judge Caldwell when he came to decide the case of *Wright v. Oberlin*, 13-23 O. C. C. 509 (3 N. S. 242), and *Morehouse v. Burgot*, 12 Circ. Dec. 163 (22 R. 174), but that the distinction was recognized in the case of *Mott v. Toledo*, 7 Circ. Dec. 216 (17 R. 472)."

And so I think there is no doubt, from the trend of the authorities in this state, that the statute of limitations does run whenever there has been an exclusive, open and adverse possession for a period of twenty-one years or more. Just when the statute would begin to run becomes a very important question. If the original entry amounted to a disseisin, why, of course, the statute of limitations would begin to run from the very entry of the person claiming under the statute of limitations. In the case of *McAllister v. Hartzell*, 60 Ohio St. 69 [53 N. E. Rep. 715], the court held that the statute of limitations did not run unless the possession, which in time might prove a full defense against the holder of the record title, was actual, open, exclusive, continuous and adverse. In that case the possession in the first instance amounted to a disseisin of the plaintiff, and hence the statute commenced to run from that period, and the question there is as to what acts of the de-

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fendant or what admissions of the defense would in effect toll the statute; and they held that neither a mere offer to buy within twenty-one years, nor acknowledgment by the claimant within that time that the title is in another, nor that the claimant does not own the land, will have that effect. That case is relied on by the defendants in this action to do away with the admissions contained in the answers in *Holmes v. Railway*, 15 O. F. D. 906 [93 Fed. Rep. 100], which I will refer to hereafter. It is sufficient at this time to call attention to the fact that in *McAllister v. Hartzell*, *supra*, the original entry differed very materially from what it does in this case, and the decision of the court goes only to the effect that where the original entry is a disseisin, then, in that case admissions by the defendant that they did not own the property would not interrupt the running of the statute. That distinguishes it from this case, as I will endeavor to show hereafter. But there can be no question that if the railway companies have occupied this strip of ground openly, adversely and exclusively, recognizing no title except that of their own from 1849 down to 1893, when this suit was commenced, they would have a complete and absolute title to this ground and the city could not maintain this suit.

That brings us to the question as to how the railway companies obtained possession of this property. They set up various sources of title, and I presume if they have a good title by any of them it will be sufficient for this lawsuit. Eliminating for the time being the contract of 1849, let us see what the defendants claim: They claim, first, that the city abandoned this property and they got their title by abandonment; that it had ceased to occupy said property for street purposes when in 1844 they allotted a portion of it, when Silas Merchant made a map or plat of the Bath street property and laid out Commerical street and some other streets and cut Bath street down to a width of one hundred feet, and the city, in pursuance with an act of the legislature that was passed in 1844, leased out certain portions of this, the property of various persons for various purposes.

It is difficult to understand how it can be claimed that there was an abandonment of this property. Under the act incorporating the city of Cleveland in 1836, the city of Cleveland was given authority to mark the boundaries in its streets and the law was either then passed, or shortly afterwards was passed, which provided a way in which streets and public places might be vacated, and the city had full power under this act of 1836 to vacate or abandon the property for street purposes if it saw fit. Not desiring to act under the broad authority given under this act of incorporation and the methods provided for by statute as to how streets shall be vacated, they sought authority from the legislature, which was given them by the act of December 21, 1844 (43 O. L. 3), to temporarily utilize this property for some other purpose.

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They evidently having in mind the idea of the original proprietors of the town that there should be some means of communication with the lake, and the only means provided being over Bath street, it seems that the authorities of the city of Cleveland, in 1844, desired to keep this for the public and were careful not to take the steps that would result in permanently vacating this property for street purposes, for in the act of 1844,—which was an amendatory act to that of 1836 which incorporated the city of Cleveland—it was expressly provided that the city council of the city of Cleveland shall have full power and authority to construct wharves, docks and slips upon or in any portion or portions of the streets of said city adjacent to the Cuyahoga river or Lake Erie, reserving free from obstruction such portions of said street as shall, in their opinion, be required for public use.

Section 2 of act 43 O. L. 3 provides that said city council shall also have full power to lease any portion or portions of said street not in their opinion required for public use, or any wharves, docks or slips constructed upon or in the same, upon such terms and for such periods, not exceeding ten years in any one lease, as to them shall seem expedient, and all rents and profits accruing from said lease shall be set apart in a fund for improving the wharves and streets of said city.

Now, I cannot conceive how, when the city got this authority to so use a portion of its streets, and the fact that they did lease portions of them out under the authority of this act,—I say, I cannot conceive it to be possible that it should be regarded as an abandonment of its right in the street. As I have already said, no part of the city of Cleveland belonging to the public touched upon Lake Erie except over Bath street, and it must have been Bath street that was in mind when this act was passed. Indeed, I think it absolutely conclusive that the act was passed for no other purpose than to enable the city to temporarily occupy a part of this street, which had grown to be quite a stretch of land, for purposes other than driving over it and using it as a street, having in mind always that the occupancy was only to be temporary; and I think the reason why they chose to have a special act of the legislature rather than to act under the powers given under the act of incorporation, is conclusive that they did not intend to abandon the street or to vacate it but to keep their title for the public, so that when it was necessary it might be reclaimed by the public. Hence, there having been no abandonment, the railway companies or nobody else could acquire title in this way.

It is next claimed that the railway companies acquired this land by appropriation. And, indeed, the learned circuit court of the United States, overruling all other contentions of the defendants, finally found in their favor, upon the theory that there had been an appropriation of this land. It is true that appropriation proceedings were taken by

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the railway companies, or some of them. In fact, before the contract of 1849 a resolution had been passed to appropriate all of the property outside of a one hundred foot line. This was in 1848. But that appropriation never went through, and the fact that it did not go through, that the city chose to make an agreement with the railway companies, shows that the authorities of the city had some purpose in their minds by which they might keep some sort of control over this property.

But the appropriation upon which the defendants rely—or rather, the defendant, the Pennsylvania Railway Company and its predecessor in title—was not the appropriation proceedings that were contemplated by one of the railroads in 1848, but an appropriation to cut off some title that some various persons were claiming, some by way of lease and others by way of deed from the trustees of the Connecticut Land Company, and others by deeds from the heirs of the former owners of the Connecticut Land Company,—and the appropriation talked about was the appropriation to cut off the rights of these persons. The city was in no manner a party to that proceeding. It is alleged that the naming of unknown persons would include the city of Cleveland. That is not possible. The city of Cleveland was a known party; it could not be deprived of its property rights, if it had any, by proceedings in which it was not a party, and, indeed, the learned United States circuit court of appeals, in criticizing the finding of Judge Hammond in the court below, held that such proceedings did not bind the city. However effective it may have been to those who were seeking title and tracing it back to the Connecticut Land Company, it could not be effective against the city. It is difficult to see upon what theory those claiming through Camp and Lloyd and those claiming through those from whom Holmes got his title could have any interest in this property whatever. Lloyd, when he saw that this property would be valuable and was greatly increasing from the accretions, undertook to get a title from the trustees, who were the holders of the naked legal title without any beneficial interest whatever, and in their deed to Lloyd they do not claim anything. They sold for a consideration received, quitclaimed any and all interest which they, as trustees, might have. If Lloyd got any title, he had no beneficial ownership; but from the time of the final meeting of the Connecticut Land Company in 1809 down to 1836, there was no claim from anybody that the Connecticut Land Company or anybody claiming through them owned any land located where this land is located, and it is difficult to conceive upon what theory the Lloyd title could be built up; and it would be of no importance in this action if it were not for the fact that the Pennsylvania Railway Company through its predecessor in title claims to hold this entire strip of land by deeds from Lloyd and those who claim under Lloyd and by ap-

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propriation and appropriate court proceedings to have acquired a color of title, and that they have held under this so-called color of title for a period of more than twenty-one years before the beginning of this action, and, therefore, they say the statute of limitations is a complete bar to the city's right to recover. There can be no question but that if one goes into possession of property and holds it openly, adversely and exclusively for a period of twenty-one years, that title then ripens into a perfect title. But when did this so-called color of title arise in this action? Was it subsequent to the contract of 1849? There can be no question but what in 1849 the city of Cleveland owned every inch of this property for street and public purposes; and there can be no question, from the evidence in this case, that the railway companies regarded the city of Cleveland as being the owner and occupier of this property when the contract of September 13, 1849, was made. Now, is it possible for the defendants to go into possession under a contract with the city of Cleveland? Assuming for a moment, for the sake of argument, that the city of Cleveland had not parted with its paramount ownership but still retained the right to control this tract of land subject to the rights given it by the railway company, is it possible, I say, they going into the possession of the property recognizing such a right in the city, that they then can acquire color of title from other persons and when the city of Cleveland believed, and it had the right to believe, that the railway companies were holding under them; that by such color of title held for a period of more than twenty-one years they could oust the city of Cleveland from its rights over the property, and by adverse possession? I do not think the argument will stand for a moment, and the railway companies could not predicate their adverse holding upon color of title obtained from any other source than from the city of Cleveland itself.

I will repeat that in 1849, in my judgment, there is no question but what the city of Cleveland representing the public had the absolute right, title and interest in all the strip of land in controversy in this suit, and that no person or persons claiming through Lloyd or through Holmes or through any title derived from the Connecticut Land Company could successfully maintain their rights to the property. So, whatever rights the railway companies, the defendants in this action, have in that property is traced back to the contract of 1849, and the proper construction of that contract will determine the rights of the parties in this action.

If the contract of 1849 was such that it gave the railway companies the absolute ownership to this property, and they have occupied it from that time down to the beginning of this suit adversely, their title has ripened into a perfect title and they cannot be disturbed, even though the city of Cleveland had no power to make the contract, even though

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it was an *ultra vires* contract, because the structures erected upon said ground would be of such permanent nature and the occupancy would be so exclusive that the statute would begin to run from the inception of the contract. So it becomes more and more important to examine into the whole question as to the circumstances under which this contract was made in order to judge of its force and effect. What was in the minds of the officials of the city of Cleveland, and what was in the minds of the officers of the railway companies when this contract of September 13, 1849, was made? There can be no question that in those days railway companies were regarded as a part of the public, and occupancy of public streets, public wharves and grounds by railway companies would be in accordance with the public use for which streets and other public places were dedicated.

It is claimed by Judge Lawrence on behalf of the city that the city gave the defendants rights to lay certain tracks but did not give them the right to erect depots, freight houses, turntables, etc., and, if I understand his contention, it is that, so far as the railway companies have occupied the property with this sort of structures, they are committing a public nuisance that can be abated at any time, or perhaps they are occupying under a revocable contract that was revoked by the commencement of this suit in 1893. If I were to agree with Judge Lawrence upon that contention, I could do no other than to find for the railway companies, on the ground that the statute of limitations was a complete bar. But I do not agree with counsel for the city, that this contract only gave them the right to lay certain tracks. I think a close scrutiny of that contract will disclose that the railway companies had the right to do whatever they have done with reference to the occupancy of that tract of ground; that they had the right to build turntables; they had the right to build passenger houses; they had the right to build freight depots. And, again, I say that if it was the intention of these parties to give absolutely all the rights the city had in this property without any string being attached to it, then I say the railway companies have occupied it in such a way and in pursuance of that contract that the statute of limitations is a complete bar against recovering any portion of the property.

But did the city of Cleveland intend to barter away its access to the lake? Did the city of Cleveland intend to give up all its rights over that which wharves might be built on Lake Erie on the public grounds of the city, and did the railway companies intend that when this contract was made the city should lose all right, title and interest in and control over this property? To get at this question necessitates an examination of all the surrounding circumstances, and everything which throws light upon the question ought to be examined, for in the

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proper construction of that contract must ultimately depend the rights of the parties.

If I am right in my contention, that the city of Cleveland acquired title to this Bath street strip by dedication from the Connecticut Land Company in 1796 and subsequently, she proved her rights in the strip religiously without any questions being raised down to 1836.

The government straightened the channel to the entrance of the Cuyahoga river in 1827. The census immediately following this date, to wit, 1830, showed that there were 1075 people living in Cleveland, and the growth of the next decade showed a wonderful increase; and in 1850, just after this contract was made, the population of Cleveland was 17,054. Now, with this development of the city going on, it seems almost incredible that Cleveland would barter away her access to the lake so as to lose absolute control over it. It must have been perfectly apparent to anybody that this piece of property, located as it was at the confluence of the river and lake, would be the natural terminal facilities for such railways as might locate in Cleveland and would be the means of communication between the lakes and the railroads, from which two sources Cleveland would get all her commerce. Now, this being the situation, and this property having increased from a mere strip along the lake to an extent of over twenty acres, it actuated Lloyd to see whether or not he could not get some sort of a title to it, and, as I have already said, he procured a quit claim deed from the trustees of the Connecticut Land Company; but he made no claim until very much later.

The city of Cleveland was incorporated, as I have said, in 1836, and it is important to notice the act of incorporation, for it is claimed by the Pennsylvania Railway Company, one of the defendants herein, that this act gave them the power to do whatever they subsequently did with this property, and that if the power was lodged in the city anywhere to make a contract, that the Railway Company could rest its rights upon that power. There can be no question but that in the act of 1836, Cleveland was made a body corporate and could contract and be contracted with and was given the control and custody of its streets, and had authority to make bounds to its streets and to limit them in any way it saw fit. Section 8 of that act (34 O. L. 271), provided a method of vacating streets or portions of streets. Section 6, giving the council the right to establish and settle the boundaries of all streets or highways of all kinds within the city, and to prevent or remove encroachments thereon. Section 8 also provided:

“The city council shall cause the public streets, roads, lanes, alleys and highways and the public squares and other public grounds that now exist within the limits of said city, to be, by the surveyor of the county

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of Cuyahoga, or some other competent surveyor, to be surveyed, described and permanently marked," etc.

So, had the city of Cleveland intended to vacate or abandon any portion of the Bath street tract, it had ample authority by the act of incorporation. So when, in 1845, this land had grown by the accretions to be a large tract of land, more than was necessary for the immediate use of the public for street purposes, the city did not act under the act of incorporation but they sought by a special act of the legislature, which was passed December 21, 1844, to which I have already referred, giving the city council the power to construct docks or slips upon any of the streets or places adjoining Cuyahoga river or the lake, and to lease out such portions as were not needed for street purposes for a term of years, not exceeding ten in any one lease, under and by virtue of which authority the Merchant plat was made and the thirty-one lots above alluded to were laid out, together with some streets giving access to the property. Now, I say that the city council, seeking this authority by special act instead of acting under their general authority provided for under their act of incorporation, is a significant act and shows that the city of Cleveland did not intend to abandon this strip of land, but were temporarily using it and making leases for such terms so that they at any time could regain possession to make such use of it as they might see fit. This was the situation when, in 1848, the Cleveland & Pittsburg Railway Company passed a resolution, by the board of directors, declaring it necessary to appropriate this Bath street tract, all except a one hundred foot strip on the south side that had been kept open by the Merchant plat for street purposes. In the meantime those claiming through Lloyd had brought several ejectment suits against the tenants of the city, contending that this Bath street strip, if it were dedicated, was dedicated for public purposes and in using it for any other purpose it would revert to the original owners, and Lloyd's quitclaim deed garnered up this title, and therefore Lloyd or those claiming under him were entitled to the reversion.

Or, it may be that his claim was that the accretions did not belong to the littoral owner but created a separate estate unattached; in other words, that the land under the water belonged to the Connecticut Land Company, and when the water receded its title would vest in the Connecticut Land Company, and hence in Lloyd. However this may be, Lloyd was making some claim to this property, and, indeed, had won an ejectment suit,—just upon what theory it is difficult to discover—but he had won and the case was pending on some error proceedings in the Supreme Court of the state, while several other suits were still pending in the lower courts. This was the situation when the railway company made up its mind to appropriate. Under their charter

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they had the undoubted right to have appropriated this property. The city of Cleveland seemed to recognize this right, and it was possible then, as it is now, for the city to agree as to how the property should be held.

It has been contended in this litigation that the railway company could appropriate without the consent of the city. I think the United States circuit court of appeals denies that right. However that may be, the city had the power to agree, and rather than to have them appropriate, they made the agreement of 1849, under and by virtue of which the railway companies went into possession of this ground and have occupied it ever since. Did the city of Cleveland prefer to have this contract made with the railways rather than to have them appropriate because they wanted to have something to say about the use of this property? The contract itself is ambiguous. Indeed, Judge Lurton, in his opinion, says that it is a most ambiguous contract. But irrespective of the construction that the parties themselves put upon it in the answers they file in the Holmes case, there are several things in the contract which are worthy of notice, and I believe that the contract must be construed strongly against the railway companies and strongly in favor of the city, which represents the public. I believe this is in accordance with the unbroken line of authorities, that a grant from the public is construed strongly against the grantee.

It is claimed by the city in this action, by virtue of recent decisions, that an attempt of the city to deed away all the rights of the public in its public places is *ultra vires* and the contract is of no effect; that when they leased this property, if the contract of 1849 can be called a lease, their rights were limited to ten years, and then only for certain purposes; that everything in excess of that was void.

The railroad companies, on the other hand, claim that the power to dispose of this property in the manner that they claim it was disposed of, if not authorized by the act of 1844, it was by the act of incorporation of 1836.

But, coming back to the contract: Besides the consideration of \$15,000, it is recited in the contract that the railroad companies, because the contract was made not only with the Big Four but for the benefit of the other companies who are now defendants in this action (or rather with their predecessors in title) should settle with Lloyd and Camp and those claiming through Lloyd and Camp and hold the city harmless, and for the purpose of making a settlement with Lloyd and Camp there is a very significant clause in the contract. It is as follows:

"And to enable said company to compromise and settle with the claimants Lloyd and Camp and all other claimants for the extinguishment of their claims to said premises or any part thereof, they may allow them to retain such portion thereof as may be necessary to effect

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such settlement, and it shall not be deemed necessary to be used for railroad purposes."

The force of that clause, to my mind, is convincing, that it was not intended by this contract of 1849 that this should operate as a sale of this property to the railway companies, for, if it were, it would not have been necessary for the city of Cleveland to give its assent to the transferring of part of this property to the Lloyd and Camp claimants. It seems to be regarded by the contracting parties to the contract of 1849 that in order that the railway companies could transfer a part of this property or authorize its transfer, the consent of the city of Cleveland was necessary. Now, remember, that at this time it must have been perfectly apparent by the constant accretions that were going on that this was an exceedingly valuable piece of property, and that the city could have compromised with the Lloyd and Camp claimants by turning over a part of this property if it were necessary as well as to have authorized the railway company to do it, and they could have retained the balance themselves. The \$15,000 in evidence that the railway company paid the city would not begin to be the principal sum on which they were receiving interest by way of rentals from the property by virtue of the leases made prior thereto, and it was constantly increasing in value; so the sum that was paid to the city was a mere trifling sum to what it was worth to the railway company, if the railway company's contentions are right.

But there are other things in the contract: one indicates that the city of Cleveland meant to keep control over the property. For instance, this clause (see *Cleveland v. Railway*, 12 O. F. D. 459 [93 Fed. Rep. 113, 140]):

"The said company shall not lease any part of the premises to any person or persons, company or companies, to be used for conducting or carrying on forwarding, storage, or commission business, or for the erection of warehouses thereon for the accommodation of such business; nor shall said company use said premises, or any part thereof, for the purpose of engaging in, accommodating, or aiding in the transaction of forwarding, commission, or warehousing business, with a view, either directly or indirectly, of deriving profit therefrom, nor shall they grant the right to any railroad company, person or persons, or other company or companies, so to do."

This clause indicates that the city of Cleveland retained some control over the property and limited the holding of the railway companies.

There is still another clause, which is as follows (page 139):

"Said company shall take and hold the same subject to all legal claims, either in law or equity, of any person or persons, company or companies; it being expressly understood that the city does not guaranty or warrant either the title or the right to occupy the same, the

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said railroad company to have all the money compensation, interest, benefits and rights which the city could in any manner be entitled to on account thereof."

Now, it seems to me that what the city of Cleveland and the railway company undertook to do in that contract was, here was a great strip of land that was dedicated to the public for public uses and that was suitable for railway terminals, and that it would not be in violation of the purpose for which the street was dedicated to permit railroads to occupy this property, but it was to be occupied subservient to the paramount right of the city. The city was to have the title and to retain it, and the contract was in the nature of a perpetual license for the railway companies to occupy under certain restrictions; and I have no doubt that the city thought and the railway company thought that the holding of the railway company was to be in this way, and the property that was made by subsequent accretions was to be the property of the city, and, if the railway company occupied it, it was to be under the terms of the original contract. With this understanding as I conceive it to be, the railway companies went into the occupation of this property shortly after 1849. They subsequently, by virtue of their agreement with the city of Cleveland, settled in various ways with the Lloyd and Camp claimants,—some by contract and some by appropriation,—perhaps two or three years after the contract was made, the entire strip in controversy by deeds and appropriation, so that they acquired from other sources the entire paper title to the entire strip in controversy; and now they claim that was color of title, and they have been holding under that ever since and it has ripened into perfect title by adverse possession at least. I have already referred to this, and suffice it to say, at this point, that I do not believe they can dispose of the city's title in this way by a title thus acquired subsequently to going in under a contract with the city.

But we are not left to a construction of this contract to be made more than fifty years after the contract was drawn. Shortly after it was made the parties themselves put a construction upon this contract.

In 1854, in the United States district court of the northern district of Ohio, an action was brought by Henry Holmes, Julius C. Sheldon and others on behalf of themselves and other heirs of the stockholders of the Connecticut Land Company to recover this land, and all the railway companies now defendants, or their predecessors in title, were made parties defendant. The plaintiffs alleged that the railway companies were occupying the premises through a title obtained through Thomas Lloyd, and that Thomas Lloyd fraudulently procured a deed from the trustees of the Connecticut Land Company conveying the land claimed in the suit, and that the defendants were in possession of the land under a title made from said Lloyd with notice of the trust and

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the fraud. The prayer of the bill was to set aside the fraudulent deed, dissolve said trust and have a partition of the said land and an account of the rents and profits thereof derived from the defendants.

It would have been sufficient for the railway companies to have denied the title of the plaintiffs and have gone into that suit and beaten the plaintiffs because of the weakness of the plaintiff's title, for it was held by the learned Judge McLean in that case, that the plaintiffs had no title to this property in any way, shape or manner, and held that Lloyd had no title to the property in any way, shape or manner. But the defendants were not content with doing that. They, by their answers filed shortly after the contract of 1849 was made, when the circumstances surrounding the transaction was fresh in the minds of all, construed this contract, and they denied that they held this land from Lloyd, or from any one save the city of Cleveland.

Judge McLean, in the case of *Holmes v. Railway*, *supra*, page 102, summarizes the defenses set forth in the answers of the defendants in that action as follows:

"The defendants insist that the title to all of said land covered by the water of Lake Erie is in the public, and not in any trustee for them;" (Let me say by way of parenthesis, it embraced not only the land already made but a certain amount of land under the water of the lake. I believe their claim extended to the Canadian boundary. And let me say in passing, that the railway companies had appropriated or acquired from Harbaugh a strip of land covered by water from a point so many feet south of the low water mark of Lake Erie where it touches Bath street to the Canadian boundary.) "and as to the residue of said land, rely for a defense upon the equitable bar furnished by lapse of time, want of title and equity in the complainants and upon a dedication of said land to the public by the Connecticut Land Company as early as 1796, accepted immediately thereafter, and ever since used in accordance with the purposes of the dedication. They deny that they are in possession under the title derived from said Lloyd, and aver that they are in possession, under the authority of a statute of the state of Ohio, in pursuance of a license granted by the city of Cleveland, and using the same in manner consistent with the original dedication."

The answer itself, after reciting its corporate capacity, and the *termini* of the road, says, page 145:

"It being necessary to connect the same with the waters of said lake and river within the limits of said Bath street for the delivery of freight and passengers, and exchange of freight and passengers with other roads, and with the water craft navigating the said lake and river, and the same being also a suitable place for the terminus of said railway within said city, this defendant, under a license obtained from said city of Cleveland on the thirteenth day of September, A. D. 1849,

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has laid down in proper manner and not otherwise its railway tracks upon said Bath street, as shown in said diagram, and in such manner as to connect its railway with the waters of said lake and river. And this defendant is now, and for some time past, has been running its railway carriages in connection with said Cleveland, Painesville & Ash-tabula Railroad Company upon the tracks so laid down to and from said river and lake, for the purposes aforesaid, in a prudent manner. at reasonable times, and so as to work no inconvenience to other legitimate uses of said street."

This characterizes the manner in which the railway companies went into the possession of that property, and how they were holding the property when this suit was tried. The suit was pending from 1854 until it was finally decided in favor of the railway company in 1861, and it is admitted in this action that the character of the occupancy of the railway companies was the same then that it was in 1893, when this suit was brought. If the city of Cleveland had been a party to this suit, the railway company would have been estopped from disputing their manner of holding this property. As it is, I do not think they are estopped, but the construction that the railway companies placed upon this contract at that time is, to my mind, consistent with the entire contract, consistent with the condition of the law at that time, and consistent with the evident purpose of the city of Cleveland in making the contract.

The learned Judge Hammond, who first tried this case in the United States court, held that this recitation in this answer as to how the railway companies held this property, was absolutely conclusive upon them. I do not believe it. He then decided that by a subsequent appropriation proceedings, to which the city of Cleveland was not a party, they acquired possession, and so decided the case against the city.

If the railway companies had acquired this property from any other source that would give them a good title, I don't believe the answer would estop them from showing it. But the answer, to my mind, shows that from 1854 down to 1861 they were occupying this property as a licensee of the city of Cleveland, recognizing the paramount right to be in the city; and the importance of this is that it distinguishes this case from the case of *McAllister v. Hartzell*, *supra*, as to the time when the statute of limitations begins to run, as well as to distinguish this case from that as to what declarations will toll the statute. In that case the original entry was a disseisin, and the court holds that where such is the fact, the mere admission of the defendants that they did not own the property, or that some other person does, will not toll the statute.

Now, if the railway companies went into possession as the licensee of the city of Cleveland, their holding was not adverse. and the statute

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of limitations would not begin to run, and I say it distinguishes this case from *McAllister v. Hartzell*, *supra*.

As I have shown, the railway companies could not rest their title upon any source other than that of the city of Cleveland. Now, in my judgment, under this contract of 1849 they did not go into possession absolutely, exclusively, adversely, but they went in recognizing the paramount title of the city of Cleveland, and they continued to recognize that title down to 1861, when the Holmes case was tried; and there is not a scintilla of evidence in this record to show that they disputed the title of the city of Cleveland until 1893, when they filed their answers in this lawsuit. And if the character of the holding and their occupation was the same when the Holmes case (in 1861) was tried as it has remained ever since, then when did they begin to hold adversely?

It is perfectly apparent that if one builds a permanent structure which would exclude the public from the premises, then that would be notice to the world that the builder of that structure intended to hold it adversely, unless he admitted that he held it in some other way; and in their admissions in this answer in the Holmes case they admit in what manner they held this property, and consequently the building of permanent structures would not be an adverse holding. And, in my judgment, there was no adverse holding, no exclusive holding under a claim of ownership as against the city until this suit was started and the answers were filed in this action; and if the answers had set up the same sort of a defense that they did in the Holmes case, the city of Cleveland would have been defeated in its actions here, because the railway companies had the right to occupy in the manner that they have occupied by virtue of that contract. But when they undertook to deny all right to the possession by the city of Cleveland and all title to the city of Cleveland, alleging that they owned it absolutely, it amounted to an ouster, and, unless they have acquired rights other than the contract of 1849 gave them, they have no right to oust the city of Cleveland of whatever rights the city retained in that property by virtue of the contract of 1849.

I know it is claimed that the answer in the Crawford and Price case that was filed by the city is sort of an admission by the city. I do not think that the answer will bear that construction exactly, and the answer of the city is perfectly consistent with the interest that I conceive that the city retained in this property. They recite, among other things, after reciting the suits that have been started by Lloyd and Camp, etc.:

"That it was the interest and wish of the respondent to get clear of all controversies whether legal or otherwise, and for that reason this respondent was unwilling to have said company obtain possession of said property by the power given them by their charter, but proposed

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and believed it to be for the interest of this respondent, and for all parties having any interest in said property, to make an amicable arrangement by which said company might be invested by all the rights of this respondent in said property. Upon these views, this respondent being compelled to transfer to said company said property, and preferring to do so under a negotiation, than to have it taken under and by virtue of said company's charter and appropriation, and desirous of avoiding all controversy with said company, for the convenience and advantage of this respondent the said negotiations and contract were made between the company and the respondent."

This is perfectly consistent, and, indeed, strong evidence that the city did retain an interest in this property; otherwise, why would they want to preserve the interest of whom they represented in the property, to wit, the public?

Again, quoting from the answer:

"Respondent admits it to be true that, by the terms of the contracts between the city of Cleveland and said company made on the thirteenth day of September, 1849, as aforesaid, said company took the interest of said city in the said Bath street property subject to all the rights and privileges of all other persons which would be legally enforced against the property had the city continued to hold the same, and also assumed all the legal liabilities to other persons which rested on the city in the relation to said property, up to that time."

Now, taking the whole answer to the Price and Crawford case, I think it is consistent with the construction, in accordance with the views I have herein expressed. The learned United States circuit court of appeals put something into the contract of 1849 which was not there, that is, that the railway companies were to have exclusive occupancy of this property. I have read the contract with much care several times, and I cannot find those words. I know it is alleged that the word *occupy* means to exclude. That depends upon the manner they occupy, whether they recognize a paramount title or not. As I claim, that has been recognized by the railway companies in this case.

Much light has been thrown upon the character of this case by later decisions of our Supreme Court. As to just how far they would affect the rights of the defendants in this action if there had been an earlier construction placed upon these statutes which is contrary to the present construction, I do not deem it expedient to discuss, since, in the view I take of this case, it does not make any difference.

I therefore hold, that the city of Cleveland is entitled to maintain an action in ejectment in this suit to recover possession of the property, subject to the railways' right of easement in the property.

The railway companies by a disclaimer disclaimed any right to the 132 foot strip on the south side of the track of land described in plain-

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tiff's petition, as well as the strip along the river. That portion is eliminated from consideration.

I have said before that there may be some difficulty in drafting judgment to meet the requirements of this case; but in *St. Louis v. Railway*, 114 Mo. 13 [21 S. W. Rep. 202], it is decided that the fact that a railway company may have a vested right to the use of one or more tracks upon the public street will not constitute a bar to an action in ejectment from the street by the city, where the company denies the city's title. The reciprocal rights of the parties in such a case can be defined in the judgment.

And so I say, the decision will be for the plaintiff, the city, to recover all that portion of Bath street not covered by the disclaimer in the answers of the defendants.

STREET RAILWAYS.

[Hamilton Common Pleas, October 2, 1905.]

CARRIE ANTHONY v. CINCINNATI TRACTION CO.

TENDER OF FIVE DOLLARS FOR STREET RAILWAY FARE NOT REASONABLE.

The tender to the conductor of a street railway of five dollars in payment of a five-cent fare is not reasonable, and the tender need not be accepted.

[Syllabus approved by the court.]

E. M. Ballard, for plaintiff:

Cited and commented upon the following authorities: *Illinois Cent. Ry. v. Harper*, 35 So. Rep. 764 (Miss.); *Hutchinson, Carriers*, Sec. 567; *Barrett v. Railway*, 81 Cal. 296 [22 Pac. Rep. 859; 6 L. R. A. 336; 15 Am St. Rep. 61].

Kittredge & Wilby and G. P. Stimson, for defendant.

SWING, J.

This case was argued and submitted to me upon a question of law growing out of an agreed statement of facts.

The question of law is, whether the tender by a passenger on a street car of five dollars to be changed for a five-cent fare is reasonable and must be accepted.

This question was decided by the court of appeals of New York in *Barker v. Railway*, 151 N. Y. 237 [45 N. E. Rep. 550; 35 L. R. A. 489; 56 Am. St. Rep. 626]. The syllabus is as follows:

"Street Car Company.—Rule as to Furnishing Change.—A rule of a horse street car company in a large city, requiring its conductors to furnish change to passengers to the amount of two dollars, is reason-

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able; and a tender, by a passenger, of five dollars to be changed for a five-cent fare, is unreasonable and need not be accepted.

“Knowledge of Rule.—A common carrier is not required to bring home to each passenger a personal knowledge of any reasonable and just rule which it is seeking to enforce.”

In the present case the company had a rule, as in *Barker v. Railway, supra*, requiring conductors to furnish change to the amount of two dollars; but, as in *Barker v. Railway, supra*, the plaintiff did not know of the rule. The court of appeals in the opinion, page 242, say:

“In the case at bar the reasonableness of the rule established by the defendant is obvious. In a large city like New York, the round trip of a car of any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change. When the defendant enacted the rule requiring its conductor to furnish change to a passenger to the amount of two dollars, it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars. It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares.”

The court then say that to hold it necessary to bring home to each passenger a knowledge of the rule of the company would render the enforcement of the rule impracticable. The court further say on the reasonableness of the rule:

“We have been cited to but one case holding with the plaintiff in this action. *Barrett v. Railway*, 81 Cal. 296 [22 Pac. Rep. 859; 6 L. R. A. 336; 15 Am. St. Rep. 61]. We agree with the learned supreme court of California that a passenger upon a street railroad is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount; but we cannot assent to the conclusion that a tender of five dollars is a reasonable sum. It is quite possible that there existed local reasons for the decision in California, as the judge writing the opinion suggested that the five dollar gold piece was practically the lowest gold coin in use in that section of the county.”

In *Barker v. Railway, supra*, the court of common pleas had decided for the defendant, and its judgment was affirmed by the court of appeals. I have quoted this case at length because it is a clear statement of the matter.

The same question was decided in the case of *Muldowney v. Traction Co.* 8 Pa. Supr. Ct. 335. Syllabus:—

“Street railways may make reasonable regulations upon the subject of fares and refuse to carry passengers who will not comply with them.

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"The reasonableness of a tender of money in excess of the fare is a question of law to be determined by the court. *Held*, that the tender of a five-dollar bill for a five-cent fare was unreasonable as a matter of law, and that the conductor was not bound to accept it and give back the change."

This case was decided for the plaintiff by the court of common pleas, but for the defendant by the superior court, reversing the common pleas, and does not seem to have been carried further. The superior court in the opinion cite and follow the case of *Barker v. Railway, supra*.

The rule, as declared in New York and Pennsylvania, is adopted by *Nellis, Street Surface Railroads* 477.

Upon these authorities and being of opinion that the rule announced by them is the reasonable rule I feel compelled to find for the defendant in this case.

DEPOSITIONS.

[Hamilton Common Pleas, 1908.]

SHERMAN MILLER v. AUBURN HOTEL CO.

ADVERSE PARTY MAY COMPEL NOTARY TO FILE DEPOSITIONS TAKEN IN A CASE UPON TENDERING COSTS THEREOF.

An adverse party, employing counsel to cross-examine witnesses on the taking of their depositions, upon tender of the costs of the notary, is entitled to have an order directing such officer to file the depositions in the case according to law.

[Syllabus approved by the court.]

APPLICATION to require filing of depositions.

Roettinger & Gorman, for plaintiff.

C. B. Wilby, for defendant.

WOODMANSEE, J.

In this action, plaintiff, upon notice, took the depositions of two witnesses.

The defendant was represented by counsel at the taking, and subsequent thereto. Before the case was called for trial one of the witnesses died.

The notary did not file the depositions with the clerk of the court, and the matter now comes up on motion of the defendant to require the plaintiff or the notary to file the depositions in the case according to law.

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Section 5276 Rev. Stat. reads as follows:

“The deposition so taken shall be sealed in an envelope” * * *
“and such officer shall address and transmit the same to the clerk of the court.”

The notary taking the deposition is an officer of the court for that purpose, and is subject to the order of the court.

I am of the opinion that if the adverse party in a case like this, goes to the expense of employing counsel to cross-examine the witnesses, he ought to be permitted to have the benefit of anything that might be disclosed in that examination.

This motion does not go to the question of the competency of the deposition, but only as to filing the same.

The only person who is authorized to file the deposition is the notary.

I do not think the court would be justified in ordering the party who took the deposition to go to the expense of having the same transcribed, if he decides he does not want to use it; but I am clearly of the opinion that the adverse party can have the same filed at his own expense, and that upon a tender of the costs of the deposition, the notary should file the same with the clerk.

The order of the court is that upon satisfaction of the legal costs of the deposition, the notary is directed to file the same in this case according to law.

Fitzgerald v. Realty & Loan Co.

ATTACHMENT—PLEADING.

[Hamilton Common Pleas, 1909.]

JAMES J. FITZGERALD v. EUREKA REALTY & LOAN CO. ET AL.

1. MOTION TO DISMISS PARTY DEFENDANT, IN SUBSTANCE A DEMURRER, CANNOT BE SUSTAINED.

A motion as such cannot be sustained to dismiss a defendant from an action because the petition fails to allege a cause of action against such defendant; such motion is in substance a demurrer.

2. JOINTLY DEMURRING BAD PRACTICE.

Defendants having jointly demurred on the ground that the petition does not allege facts sufficient to constitute a cause of action against them or either of them waive all rights to make more definite and certain, to separately state and number and to strike out, etc.; and if a cause of action is stated against either, the demurrer should be overruled.

3. DEMURRER LIES TO PETITION ALLEGING JUDICIAL ACTS OF JUSTICE OF THE PEACE AS GROUND FOR DAMAGES.

Justices of the peace, being judicial officers, are not amenable to civil actions for damages for their judicial acts, however erroneous or corrupt, and demurrer will lie to a petition alleging such acts as grounds for damages.

4. MALICIOUS ATTACHMENT BASED ON FALSENESS OF AFFIDAVIT SUFFICIENT.

An allegation in an action for malicious or wrongful attachment which states that the affidavit, upon which the order of attachment was based, is false in that it averred that the money sought to be attached was not exempt from attachment or execution, is sufficient as against demurrer. In the absence of any allegation disclosing why the attachment was not discharged upon motion of the defendant in attachment it cannot be assumed that the affidavit was found to be true as to the fact alleged to be false.

[Syllabus approved by the court.]

J. W. Cowell, for plaintiff.

W. F. Chambers, for defendants.

GORMAN, J.

The petition in this case sets up four alleged causes of action against the defendants, but from the averments of the petition, it would seem that no more than two causes of action could be maintained on the facts alleged. Whether or not those two causes of action may be joined, is not raised nor decided.

The plaintiff in substance avers that on or about October 21, 1908, (evidently the twenty-first of July), the defendant, the Eureka Realty & Loan Company, filed an affidavit in attachment before the other defendant, Charles T. Dumont, a justice of the peace in and for Millcreek township; and the affidavit purports to be set out in full in the petition. This affidavit appears to conform to all the material requirements necessary to be set out in an affidavit for attachment before a justice of the peace under Sec. 6489 Rev. Stat. The affidavit is made by the attorney for plaintiff, A. B. Chambers, and sets out that the defendant is justly

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indebted to plaintiff for *necessaries furnished* at defendant's request; that the claim is just and lawful; that affiant believes plaintiff ought to recover the amount of \$15.40; that the property sought to be attached is not exempt from execution; that said property is the personal earnings of defendant for services rendered by the *plaintiff* (?), (evidently intended the *defendant*) within three months prior to the commencement of the action; that the defendant is the head of a family; that said claim is for necessities, and that only 10 per cent of said personal earnings and four dollars for costs are sought to be attached; and that affiant has good reason to believe that the city of Cincinnati has in its possession money, the property of the defendant. This affidavit is duly sworn to before the defendant, Dumont, as justice of the peace.

Plaintiff then avers that said affidavit in attachment was false and malicious in that said claim was not for necessities, but for money loaned, which fact was well known to both defendants in this cause when the attachment was issued. Plaintiff further avers that his wages were withheld from him through said attachment proceedings; that he was caused great mental pain, suffering and embarrassment and was prevented from buying necessities and provisions for his family to his damage in the sum of \$500.

For the alleged second cause of action plaintiff avers that on or about July 23, 1908, he called on the defendant, Dumont, at his office and was induced to confess judgment in favor of the Eureka Realty Company for \$15.40 debt, and \$4 costs. Plaintiff says "they" induced him to sign a confession of judgment on said date but does not state who is intended by "they;" but he says that said confession of judgment was obtained from him through misrepresentation by some one, he does not state who, representing that said confession of judgment was merely an acknowledgment that he owed the money and that it was merely an agreement whereby his wages were to be released. Plaintiff says that under this agreement or confession defendants took \$7.80 of his money.

For a third cause of action plaintiff sets up that on or about October 29, 1908, the defendant, the Eureka Realty Company, filed an affidavit for proceedings in aid of execution on said confessed judgment, and this affidavit is set out in full and conforms to the requirements of Sec. 1 of act 92 O. L. 375 (Lan. Rev. Stat. 10264; B. 6680-1), relating to proceedings in aid of execution before justices of the peace. The affidavit is made by A. B. Chambers, attorney for the Eureka Realty Company, and sets out the recovery of the judgment before Charles T. Dumont, J. P., on July 23, 1908, that said judgment is unsatisfied and that there is due \$10.60, and that affiant believes that the city of Cincinnati is liable to the judgment debtor in a sum of money unknown to affiant, and that same is not exempt from attachment or execution un-

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der the laws of Ohio. Plaintiff then proceeds and avers that this affidavit is false and malicious in that the money sought to be attached was exempt from execution and that fact was well known to the defendants herein. Plaintiff further avers that under the last named affidavit his wages were again attached and that he was caused great mental pain, etc., to his damage in the sum of \$500.

For the alleged fourth cause of action plaintiff avers that when the cause of proceedings in aid of execution came on to be heard on November 6, 1908, he filed a motion to discharge the attachment, which motion was overruled, and on November 10, the day of trial, plaintiff moved to dismiss the proceedings, (what proceedings he does not state), which motion was overruled. Plaintiff thereupon requested that the attachment be certified to the court of common pleas, which the defendant, Charles T. Dumont, refused; and plaintiff avers that the defendant, Dumont, ordered \$8.80 paid him or into court, the money belonging to him, and held by the city of Cincinnati, all to his damage in the sum of \$8.80.

Plaintiff further avers that the defendants, before the bringing of this attachment, failed to serve him with a 10 per cent notice as required by the laws of Ohio.

It will be seen from a recital of the averments of the petition that the plaintiff charges the defendants:

First. With having maliciously and wrongfully sued out an attachment against his personal earnings, which he claims were exempt to him as a married man and the head of a family, as provided in Secs. 5430 and 5483 Rev. Stat., and,

Second. With having maliciously and wrongfully invoked and used against him the legal process of proceedings in aid of execution before the justice of the peace, in an effort to compel the payment of the claim alleged to be due the defendant, the Eureka Realty & Loan Company. Therefore it seems that there cannot be more than two causes of action if that number exists in favor of plaintiff, to wit: An action for malicious and wrongful attachment, and an action for abuse of process.

Whether these two causes of action exist in favor of plaintiff, and whether or not they can be joined in one petition are questions not now before the court.

The defendant, the Eureka Realty & Loan Company, has filed a motion to dismiss it from this action on the grounds that the statements in the petition do not make out a cause of action against it. This motion is in substance a demurrer. There is no warrant or authority in practice or under the code for filing or sustaining such a motion *as a motion*. Counsel who filed this motion do not cite any authorities in

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support of the motion either by way of memorandum brief, or in his oral argument, and the court is left to conjecture upon what authority the court is asked to grant such a motion.

Section 5121 Rev. Stat. is noted at the bottom of the motion, but that section merely defines a motion to be, an application for an order, addressed to a court or judge, by a party to a suit, etc.

This motion will be overruled because the question of the liability of the defendant, the Eureka Realty & Loan Company, cannot be raised by such a motion.

The two defendants have jointly demurred to the petition on the ground that the allegations thereof do not state facts sufficient to constitute a cause of action against them or either of them. By so doing, they have waived all rights to move to make definite and certain; to separately state and number; to strike out, etc. By demurring, the form of the petition is deemed sufficient. Section 5062 Rev. Stat. *Laws v. Carrier*, 13 Dec. Re. 780 (2 C. S. C. 80); *Caldwell v. Brown*, 6 Circ. Dec. 694 (9 R. 691); *Montgomery v. Thomas*, 10 Dec. 290 (7 N. P. 669).

It is considered bad practice for defendants to file a joint demurrer, and if a cause of action is stated against either, the demurrer should, on authority, be overruled. *Dunn v. Gibson*, 9 Neb. 513 [4 N. W. Rep. 244]; *Asevado v. Orr*, 100 Cal. 293 [34 Pac. Rep. 777]; *Moore v. Monell Co.* 27 Misc. 235 [58 N. Y. Supp. 430].

But for the purpose of avoiding delay and in order that the court's time may not again be taken up by these matters before the court on the demurrer, it is considered best to pass upon the demurrer as though two separate demurrers had been filed by each of the defendants.

The demurrer on behalf of Charles T. Dumont, justice of the peace, will be sustained on the ground that the allegations of the petition do not state a cause of action against him. He is a judicial officer, having limited jurisdiction, it is true, but nevertheless, as much a judicial officer as any judge of the highest tribunal in the state. The office of justice of the peace is a constitutional office, created and recognized by that supreme law of the state which defines and prescribes the limits and powers of all courts and officers of this state. Article 4, Secs. 1 and 4, constitution of 1851.

A part of the judicial power of the sovereign state of Ohio is vested by the constitution, in justice of the peace—Art. 4, Sec. 1, Const., and they are as important a part of our judicial system as any tribunal exercising judicial functions within our borders.

It has been laid down from time immemorial as a rule of self preservation and safety in the administration of justice by the courts, that in common with all other judicial officers, justices of the peace are not amenable to any civil action for damages for their judicial acts, however erroneous or corrupt. *Forney v. Houck*, 1 Dayt. Term Rep.

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67; *Floyd v. Barker*, 12 Coke's Rep. 23; *Basten v. Carew*, 3 Barn. & Cr. 649; *McLendon v. Am. Freehold Land Mortg. Co.* 119 Ala. 518 [24 So. Rep. 374]; *Holcomb v. Cornish*, 8 Conn. 375; *Hitch v. Lambricht*, 66 Ga. 228; *Austin v. Vrooman*, 128 N. Y. 229 [28 N. E. Rep. 477; 14 L. R. A. 138]; and numerous other authorities that might be cited.

So long as the justice of the peace has jurisdiction of the parties and the subject-matter, his motives cannot be inquired into in a civil action for damages. *Curnow v. Kessler*, 110 Mich. 10 [67 N. W. Rep. 982].

In the case at bar, the petition which sets out in full the proceedings in attachment, the affidavit and the proceedings in aid of execution, clearly shows that the justice of the peace was well within his jurisdiction when he issued the attachment based upon the affidavit and the proceedings in aid of execution also based upon the affidavit required by the statute. The fact that the attachment might have been, or might still be set aside in a proper proceeding, does not militate against the right of the justice to issue the attachment.

While it is true our circuit court has held in the case of *Hughes v. Shields*, 18 Circ. Dec. 206 (7 N. S. 84) that a written demand upon the debtor for 10 per cent of his personal earnings, must be made before suit can be brought or attachment issued, and that such written demand is jurisdictional, and an attachment sued out before such demand is made should be dismissed. Nevertheless, this fact is not one to be set out either in the bill of particulars nor in the affidavit for attachment, but a matter to be proved by the defendant on motion to dismiss the action. In other words, this fact is a shield of defense and the attachment issued without that fact being disclosed, is not void but voidable, just as an attachment could be avoided and set aside by showing that any material averment of the affidavit in attachment was false; and upon such a showing, the attachment would have to be discharged. Sec. 6522 Rev. Stat.

The justice, therefore, had jurisdiction to proceed as he did in the case set out in the petition and for all errors committed in the trials and proceedings before him, he cannot be held in damages. The remedy open to the plaintiff for such errors is to prosecute error, or appeal to the court of common pleas.

But the case of the other defendant in the cause rests upon entirely different grounds.

The petition avers that the affidavit in attachment and the affidavit in the proceedings in aid of execution, were false and malicious and that by reason thereof, and of the prosecutions thereunder, the plaintiff has suffered damages.

In an action for malicious or wrongful attachment, it is necessary for the plaintiff to allege and prove that the affidavit upon which the at-

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tachment was based is false and malicious. It is not necessary, as in a case of malicious prosecution to aver want of probable cause, and that the attachment has terminated, nor that the action in which the attachment was sued out has terminated. *Fortman v. Rottier*, 8 Ohio St. 548 [72 Am. Dec. 606]; *McLaughlin v. Davis*, 14 Kan. 168; *Donnell v. Jones*, 13 Ala. 490 [48 Am. Dec. 59]; *Tomlinson v. Warner*, 9 Ohio 103; *Alexander v. Jacoby*, 23 Ohio St. 358-384.

The case of *Fortman v. Rottier*, *supra*, was one brought for maliciously, and without probable cause, procuring by affidavit, an attachment whereby the plaintiffs claimed they were injured as in the case at bar.

The syllabus of the case is as follows:

"An action may be maintained for maliciously, and without probable cause, procuring by affidavit and employing the statutory aid of an attachment as auxiliary to a civil action.

"Where the trial and judgment in such former suit does not necessarily involve the question of the existence of probable cause for issuing the attachment, it is not necessary that the plaintiff should aver or prove the termination of such former suit.

"Neither in such case is it necessary to aver in the petition, or prove upon the trial, that the attachment complained of had been discharged or otherwise terminated adversely to the claim of the party employing its aid, before suit was brought."

The suit was brought against Francis Fortman in the superior court of Cincinnati by William Rattier and Edward Hoeing. The petition did not contain any averment that the defendant had maliciously and falsely, and without any reasonable or probable cause, made an affidavit in attachment, etc. It was shown in evidence on the trial that Fortman recovered a judgment against the debtors who brought the suit for wrongful or malicious attachment, in the original trial, just as in the case at bar. It was further shown that a motion was made by the attached debtors to discharge the attachment before the justice of the peace, and offered to prove the falsity of the affidavit in attachment, but the justice refused to entertain the motion to discharge the attachment, very much as in the case at bar. It was further shown that the attached property was sold by the justice by virtue of an execution on the judgment in the case, and the judgment thereby satisfied; and that there was no error or appeal prosecuted from the justice's judgment, but the case was terminated in favor of the attachment creditor as in the case at bar.

The court in deciding *Fortman v. Rottier*, *supra*, per Scott, J., uses this language, on page 551:

"Now, if the affidavit was false in this particular (that the defendants were about to convert their property into money for the pur-

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pose of placing it beyond the reach of their creditors), and if Fortman had no good reason to believe it true, there would be a clear absence of probable cause. But the subsequent proceedings in the cause would not, necessarily, involve an inquiry into the truth or falsity of this part of the affidavit; nor would the final judgment at all determine this question. The existence of the debt, which is all that the judgment ascertains, does not, of itself, constitute probable cause for the attachment. [*Tomlinson v. Warner*] 9 Ohio 103."

And so in the case at bar, the plaintiff avers that he made a motion to discharge the attachment which was overruled, and he says that by misrepresentation, he entered his appearance and confessed judgment. Neither of these facts or acts prove the falsity of the affidavit in attachment that the money of the plaintiff was not exempt from attachment and execution. Nor did the confession of the judgment have any other effect than to admit the indebtedness. The petition in the case at bar does not disclose why the motion to discharge the attachment was overruled, and we cannot assume that it was because the affidavit in attachment was found to be true as to the fact of the money not being exempt from attachment and execution. But even if the plaintiff, Fitzgerald, had not appeared to resist the attachment and had allowed the judgment and attachment to go against him by default, he could still maintain this action, according to the authority above cited.

On page 553, *Fortman v. Rottier*, *supra*, the court says:

"The interests of a party may imperatively require that his property shall be released from a wrongful attachment, without delay. May he not, in such a case, promptly procure the discharge of the attachment, by the payment of the claim on which it is founded, or by executing an undertaking according to statute, and thus arrest the threatened ruin, without abandoning his right to redress for the injury already done him? The proceedings in attachment would thus be terminated, but not adversely to the claim of the party who sued out the process. Nor would such a termination conclusively show that the process was rightfully sued out."

And again on pages 551 and 552, the court says:

"But, it is said that the attachment which is complained of, must have been discharged, or otherwise terminated, in favor of the plaintiffs, before they can maintain their action. We are inclined to think that this is not necessary. The ancillary process of attachment is obtained on an *ex parte* affidavit, in the absence of the party against whose property it is issued. He has no opportunity to defend against the issuing of it. And the existence of probable cause for its issuing is not required to be shown in any part of the subsequent proceedings. It is true that the defendants in that action might have moved for a dis-

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charge of the attachment, and thus have had the truth of the alleged grounds upon which the attachment was issued, inquired into by the court. But were they bound to submit this question to the justice for review? He had already passed upon it, in their absence, and much of the injury of which they complain had been already done them."

In the case at bar if the petition showed that the motion to discharge the attachment was decided on the ground of the truth of the affidavit in attachment, we should be inclined to hold that that fact could not again be inquired into in this action; but in the absence of any averment in the petition to the effect that the justice of the peace on the motion to discharge, found the affidavit in attachment to be true in every respect, that question must be raised, if it is desired to raise it, by answer of the defendant.

For the reasons herein above set forth, the demurrer on behalf of the defendant, the Eureka Realty & Loan Company, must be overruled.

ATTACHMENT—INJUNCTION—JUSTICE OF THE PEACE.

[Hamilton Common Pleas, January 30, 1909.]

MARGARET DORAN V. MARY COLLINS ET AL.

1. ORDER OF ATTACHMENT ISSUED ACCOMPANYING SUMMONS GIVES JUSTICE OF THE PEACE JURISDICTION TO RENDER PERSONAL JUDGMENT COEXTENSIVE WITH COUNTY.

By an order of attachment issued and made to accompany summons, a justice of the peace is given jurisdiction under Sec. 584 Rev. Stat. to render personal judgment against a nonresident of his township, notwithstanding no property is seized under the writ as seems to be clearly required by Sec. 6514 to give such jurisdiction.

2. INCONSISTENT CLAIM DEFEATS ATTACHMENT.

Money received and loaned is not "necessaries" upon which attachment may issue; nor can attachment be based on such inconsistent claims as money had and received as "necessaries" and "property or rights of action which she conceals." (Obiter).

3. GRANTING MOTION TO QUASH SUMMONS AND ATTACHMENT LOSES JURISDICTION.

A justice of the peace, having granted a motion to quash summons and discharge attachment, without other appearance on the part of a nonresident defendant than for purpose of such motion, loses jurisdiction to render a personal judgment, and judgment so rendered is void.

4. INJUNCTION LIES AGAINST EXECUTION ON VOID JUDGMENT.

Injunction lies against a plaintiff having obtained a void judgment in attachment and a constable holding an execution for its satisfaction from levying upon and seizing the property of defendant.

[Syllabus approved by the court.]

Harry Hess and Joseph Lemkuhl, for plaintiff.

Powell & Smiley, for defendant.

GORMAN, J.

This cause [*Margaret Doran v. Mary Collins, James Wilder and M. F. Roebbing, J. P.*] is heard upon the petition, the answer of all of the defendants and on the evidence produced at the trial. The action is one to enjoin the defendants from harrassing or annoying the plain-

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tiff or her property, levying upon her property or proceeding against the same on an alleged judgment obtained against the plaintiff by the defendant, Mary Collins, in an action brought by her before the defendant, Millard F. Roebling, justice of the peace in and for Delhi township.

The facts disclose that on June 11, 1908, Mary Collins filed a bill of particulars in a civil action against the plaintiff, Margaret Doran, before the defendant, Millard F. Roebling, justice of the peace in and for Delhi township, asking a judgment for \$200.34, for money had and received. At the time of the filing of the bill of particulars an affidavit in attachment was filed. The ground upon which the attachment was issued and set out in the affidavit was that the claim sued upon was for "necessaries," and that the defendant, Margaret Doran, has property, or rights in action, which she conceals. The Union Gas & Electric Company was named as garnishee, and garnishment process was issued upon the affidavit in attachment. Summons was issued to accompany the writ of attachment and personal service was made on Margaret Doran on June 11, 1908, and proper service according to law was made upon the garnishee, the Union Gas & Electric Company. Bond was given in attachment as provided by statute. Summons and writ of attachment were made returnable June 23, 1908. On that day the defendant, Margaret Doran, filed a motion to discharge the attachment and release the money held under the garnishment and to quash the summons issued, on the ground that the court had no jurisdiction over the person of the defendant and that the affidavit upon which the attachment was procured was false and insufficient in law. She subsequently states in the motion that she enters her appearance for the purpose of the motion only, and not for the purpose of conferring jurisdiction. This motion was granted on June 26, 1908, as appears from the endorsement on the back of the motion; and the docket of the justice of the peace recites that on June 23, 1908, at 9 A. M., the plaintiff and the defendant came by counsel; the plaintiff duly sworn and examined and trial had and testimony heard. Defendant by counsel filed a motion supported by affidavit for the discharge of the attachment, whereupon the case was taken under advisement. On June 26, 1908, the justice of the peace entered a judgment against the defendant, Margaret Doran, for \$201.34, and ordered the attachment to be discharged.

It is claimed by the plaintiff in this case, Margaret Doran, that the justice had no jurisdiction to render a judgment against her and that therefore the alleged judgment is null and void and of no effect and that no execution can be issued thereon and no levy upon her goods and chattels to satisfy the alleged judgment. She avers in her petition filed herein that notwithstanding that the judgment was void, the defendant, Roebling, justice of the peace, has issued a writ of execution

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and placed the same in the hands of the defendant, James Wilder, constable, and that the constable will proceed to levy upon her goods and chattels by virtue of the execution, unless restrained by this court.

By the provisions of Secs. 583 and 584 Rev. Stat., a justice of the peace among other things, has jurisdiction to issue an attachment and proceed against the goods and effects of debtors in certain cases.

Subd. 4 of Sec. 584 provides:

"Where the summons is accompanied with an order to attach property the jurisdiction (of the justice) is coextensive with the county."

There seems to be a conflict of decisions as to whether or not a justice has jurisdiction to render judgment against a resident of his county but a nonresident of his township, in cases where an order of attachment accompanies the summons. The earlier authorities held that unless the order of attachment was made effective by the seizure of property or the answer of the garnishee and the giving of a bond, there was no jurisdiction in the justice of the peace to render a personal judgment against a nonresident of his township, even in cases where a writ of attachment was issued. See *Davis v. Lewis*, 8 Circ. Dec. 772 (16 R. 138); *Reich v. Pike Building Co.* 11 Dec. 418 (8 N. P. 234),—a judgment of Judge Hollister affirmed without report, by the circuit court of Hamilton county; *Orr v. Schackel*, 7 Dec. 352 (5 N. P. 246), judgment of Judge Spiegel, Hamilton county common pleas.

The court is of the opinion that the decisions of these earlier cases are founded upon better reason than those later decided. An examination of the sections providing for attachment by a justice of the peace, Secs. 6486 to 6514 Rev. Stat., inclusive, will disclose that there is no provision for trying the case on attachment, unless the attachment proceedings are made effective by the seizure of property or the answer of the garnishee, or the payment of money into court or the giving of a bond by the garnishee.

Section 6514 among other things provides:

"If in any case where an order of attachment has been issued by a justice of the peace, it shall appear from the return of the officer, and if there is a garnishee in the case, then also from the examination of the garnishee, that no property, moneys, rights, credits or effects of the defendant have been taken under the attachment, but that the defendant is the owner of an interest in real estate in the county, the justice before whom said action is pending shall, at the request of the plaintiff, forthwith certify his proceedings to the court of common pleas of the proper county, and thereupon the clerk of the court of common pleas shall docket said cause, and the action shall be proceeded with in all respects as if the same had originated therein."

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This section clearly indicates that the justice of the peace cannot proceed where no personal property has been seized under the order of attachment.

But inasmuch as the later cases now to be referred to have held that Sec. 584, Subd. 4, gives the justice of the peace jurisdiction co-extensive with the county when an order of attachment is issued and made to accompany the summons, whether the order of attachment is made effective by the seizure of property or not, the court feels bound to follow these later decisions and hold that the justice of the peace has jurisdiction to render a personal judgment against a nonresident of his township where the summons is made to accompany the order of attachment and no property is seized under the order of attachment.

These later cases are:

Kelly v. Flanagan, 11 Circ. Dec. 111 (20 R. 391); *Collins v. Bingham Bros.* 12 Circ. Dec. 825 (22 R. 533); *Rogers v. Pruschansky*, 13-23 O. C. C. 271 (3 N. S. 366).

This latter case is a decision of our circuit court in which the court held that the justice of the peace had jurisdiction of the person and of the subject-matter and that the attachment was valid.

In the case at bar, the attachment was discharged by the justice of the peace on motion of the defendant in the case before him, and it is contended by the plaintiff in the case at bar who was the defendant before Justice Roebeling, that not only was the attachment discharged, *but the summons was quashed*, thereby leaving the case pending as one in which a bill of particulars only was filed without any summons having been issued or served upon the defendant in that case.

It is further urged that there was no foundation for issuing the attachment by the justice of the peace, and that the affidavit to procure the order of attachment *shows upon its face* that it is defective and not sufficient in law upon which to base an order of attachment.

The affidavit and the bill of particulars state the nature of the claim to be for "money had and received" and that this is a "necessary." Now, it has been held that money had and received or money loaned, is not a necessary, and therefore there was no proper affidavit upon which to issue an order of attachment; but the affidavit for the order of attachment before the justice also states that the defendant has property or rights of action which she conceals, and it is contended that this statement in the affidavit is sufficient to make it good, regardless of its averment as to necessities.

The court is of the opinion that this would be true if the word "necessaries" had not been used in the affidavit; if the affidavit had merely averred that the claim is for money had and received and that the defendant has property or rights of action which she conceals; but these two *inconsistent claims* cannot be set out in the same affidavit.

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The court is inclined to believe, but does not base its opinion upon this fact, that the affidavit and the judgment were not issued in good faith against the defendant, Margaret Doran, that therefore the case of *Kelly v. Flanagan, supra*, does not apply, and that by reason of the fact that the attachment was not issued in good faith, even though a summons was made to accompany an order of attachment, the justice did not acquire jurisdiction to render a personal judgment against the defendant, Margaret Doran. This expression of opinion may be considered a mere obiter.

The court finds that the motion filed by the defendant, Margaret Doran, to quash the summons and discharge the attachment was granted by the justice of the peace *as shown by the evidence in this case*, and such being the fact, there was no order of attachment outstanding against her and no summons issued against her or served upon her; and being a nonresident of the township and not having entered her appearance before the justice of the peace before June 26, 1908, (she having specially declared in her motion that she did not enter her appearance, but appeared only for the purpose of the motion), the justice had no jurisdiction to render a personal judgment against her, and that the judgment so rendered is void.

This is not a case of a voidable judgment, but one that is absolutely void and of no more force and effect than if it had never been rendered. It is as the courts have sometimes said, an absolute nullity and a blank.

It has been urged that this injunction suit is a collateral attack upon the judgment, and this point would be well founded if the judgment was merely voidable and not void; but being void, it is entitled to no respect from any person at any time or any place. The judgment is a cloud upon the title of the plaintiff, Margaret Doran, and any property which she may have or which she may hereafter acquire, and the fact that the defendant, Mary Collins, and the constable, James Wilder, may, under the execution issued, seize some of her property, is a sufficient reason for the interposition of the arm of a court of equity. The justice of the peace cannot be enjoined because it is not within the jurisdiction or power of one court to enjoin the proceedings of another court. The court is reached through the parties and the constable.

The judgment of this court is that the defendant, Mary Collins, be enjoined as prayed for in the petition and that the defendant, James Wilder, constable, be enjoined as prayed for in the petition; that the injunction may be made perpetual enjoining them and each of them from in any manner annoying or interfering with the property of the plaintiff, Margaret Doran, by virtue of any execution or writ or order issued on said judgment.

The costs of the case are adjudged against the defendant, Mary Collins.

King v. New London.

BILL OF EXCEPTIONS—CRIMINAL LAW—INDECENT CONDUCT.

[Huron Common Pleas, October 7, 1907.]

MARY J. KING V. NEW LONDON (VIL.).

1. AFFIDAVIT IN CRIMINAL PROSECUTION CHARGING CONCLUSION OF LAW HELD DEFECTIVE.

An affidavit in a prosecution for violation of an ordinance making indecent conduct a punishable offense, which avers that accused "did violate the public peace * * * by indecent conduct, and being the owner of a certain house in said village, did suffer and permit indecent conduct to be committed therein, in violation of law," but does not set forth the acts committed constituting the offense, states a conclusion of law and is defective in that it does not advise accused of the charge upon which trial is to be had.

2. CONFESSION OR PLEA OF GUILTY BY ONE ACCUSED PERSON NOT ADMISSIBLE AGAINST ANOTHER ACCUSED OF SAME OFFENSE.

Neither a confession or plea of guilty by one of two persons charged with indecent conduct committed upon the same occasion is admissible in a prosecution against the other, especially since no conspiracy is charged in the commission of the offense.

3. DISCRETION OF MAYOR IN PROSECUTIONS FOR VIOLATIONS OF ORDINANCES PRESCRIBING IMPRISONMENT.

A mayor has discretion, under Sec. 1827 (Lan. 3360; B. 1536-879) Rev. Stat. in prosecutions for violations of municipal ordinances prescribing imprisonment to bind the accused over to the grand jury or to proceed to try him on the merits.

4. FIXING TIME FOR SETTLING BILL OF EXCEPTIONS BEFORE JURISDICTION OF MAGISTRATE IS LOST.

Fixing the time for settling, signing and filing a bill of exceptions in a criminal prosecution before a mayor or justice after verdict and sentence but before separation of parties or discharge of jury is not too late.

[Syllabus approved by the court.]

ERROR to Mayor's court.

S. L. Americus, for plaintiff in error.

E. M. Palmer, city solicitor, for defendant in error.

RICHARDS, J.

This case is brought into this court upon petition in error from the mayor's court of the village of New London, Ohio. The defendant below was arrested under an ordinance of the village and prosecuted before the mayor and tried to a jury. The affidavit charged, or attempted to charge, that "the defendant was guilty of indecent conduct."

A motion was made in this court to strike the bill of exceptions from the files on the ground that at the time the mayor fixed the date for settling, signing and filing the bill of exceptions he had lost jurisdiction of the case. It appears from the record in this case that when the verdict was received the defendant, upon being sentenced, asked

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through her counsel that the mayor fix the time for settling the bill of exceptions and thereupon he did fix the date. The record shows that at the time that date was fixed the jury had not yet been discharged, although their verdict had been received and the defendant had been sentenced.

It is the opinion of this court that under the circumstances the time of settling the bill of exceptions was properly fixed. There are various cases to which the attention of the court has been called, where it is said that justices and mayors by delay in fixing the time have lost jurisdiction, but all these cases to which my attention has been directed are cases where final judgment has been rendered and the parties have left the office of the justice or mayor, but in this case the time was fixed while the parties were still together.

It looks to me to be highly unjust, while the parties as in the mayor's court or in a justice's court, if they are unable to get a bill of exceptions because it was not asked for and the time fixed prior to the rendition of the decision. Perchance the party might not want a bill of exceptions or could not well decide until the rendition of the decision, but when that is rendered, if he thereupon promptly, before the departure of the parties, asks for the fixing of the date, it seems to me that ought to be and is under our law, in time.

This case was tried, as I have said, to a jury and many grounds of error were set forth in the petition in error, but I will not take the time to pass in detail upon all of them. One objection was made that the mayor erred in assuming that it was within his province to take final jurisdiction of the case and try the case upon its merits, the contention upon the part of the defendant below being that the case should have been sent to the common pleas court and the defendant bound over. I think, however, that there is no doubt under Sec. 1827 (Lan. 3360; B. 1536-879) Rev. Stat. that the matter is discretionary with the mayor. If he had thought, for any reason satisfactory to himself, that the cause of justice would be best subserved by binding the defendant over, he might have so done, or if he thought otherwise, he might proceed as he did and try the defendant upon the merits of the case.

The affidavit against the defendant in this case has been assailed vigorously at all steps of the procedure. It was assailed by motion to quash, and by demurrer in the court below, and by motion in arrest of judgment. In all these proceedings the mayor held against the defendant below, and that action of the mayor is assigned as grounds of error in this court. The affidavit, omitting the immaterial parts, reads as follows:

"Before me, Ralph J. Smith, mayor of the village of New London, Ohio, personally appeared G. H. Smith, who deposes and says that on or about the second day of March, 1907, at the village of New

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London in said county and state, one Mary J. King did violate the public peace of the village of New London, Ohio, by indecent conduct, and being the owner of a certain house in said village, did suffer and permit indecent conduct to be committed therein, in violation of law."

It is urged in this case that the affidavit states a conclusion, and only a conclusion, and contains no facts upon which the defendant could have been lawfully placed on trial; that it does not advise the defendant of what act she is charged. It is claimed that the charge is based upon what the affiant believes to be indecent conduct. It appears to this court that there is much force in these objections to this affidavit. It does not lie in the mouth of a complainant in a court of justice to state a conclusion of law, and rest the case upon that, and force the defendant to trial without sufficient allegations to advise the defendant upon what charge she is to be placed upon trial.

The court cannot know from this affidavit whether the things that this defendant was said to have committed were or were not "indecent conduct." The man who swore to this affidavit says "she was guilty of indecent conduct," but in what did that consist? Perhaps his idea of indecent conduct might differ from that of some other person who might be called upon to verify an affidavit, and perhaps the ideas of both of them might differ from that of the court. The affidavit ought to be sufficient in itself so that any lawyer of ordinary intelligence, reading the affidavit, could ascertain whether the thing charged against the defendant is sufficient to constitute an offense and sufficient to amount to a violation of some ordinance of the village.

The ordinance in this case seeks to punish "indecent conduct," but I take it that in the drawing of this affidavit under that ordinance, the affidavit by all the rules of legal procedure ought to set out what act it is with which the defendant is charged—what acts are claimed to constitute "indecent conduct."

This affidavit states, in the opinion of this court, nothing more than a conclusion. The court trying the defendant under this charge could not know until the evidence in behalf of the village was introduced, whether the affidavit charged an offense or whether it did not.

Suppose the affiant verifying this kind of an affidavit believes that certain conduct, which he had reason to believe the defendant was guilty of, constitutes "indecent conduct," and files an affidavit charging the defendant with "indecent conduct," and the case is tried, and when the evidence is all in in behalf of the village, it appears to the mayor that the thing which was claimed to be "indecent conduct" did not in law constitute "indecent conduct," yet the defendant has

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been placed upon trial without an opportunity to know with definiteness what offense she is charged with committing, and hence without an opportunity to subpoena witnesses, or such witnesses as may be needed to make her defense.

In *Hummel v. State*, 10 Dec. 492 (8 N. P. 48), to which I call attention, the decision is by Judge Evans in the common pleas court of Franklin county. In that case the court says:

"The rule that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proven to procure a conviction, which has not been changed by the code of criminal procedure, applies to prosecutions in police court based upon affidavits.

"If there is any relaxation of the rule as to magistrates generally, it is as to matters of form only. The charge, whether in affidavit or in indictment, must allege in some form, with reasonable certainty, every material fact necessary to be proven to procure a conviction, which includes every fact essentially necessary to a description of the offense."

In this case, I am not able to find any fact alleged in the affidavit, but simply a conclusion of the affiant that the person whom he seeks to prosecute is guilty of "indecent conduct."

In the course of the opinion in *Hummel v. State*, *supra*, the court, on page 493, says:

"It is a well settled rule of criminal pleading, that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proven, to procure a conviction, and this rule has not been changed by the code of criminal procedure. *Ellars v. State*, 25 Ohio St. 385, 388. This rule of pleading applies to prosecutions in the police court, based upon affidavits."

The averment in the case cited above was that the language was "obscene and licentious." The court says that this merely states the opinion or conclusion of the affiant. It does not characterize the offense. It does not dispense with a statement of the constituent facts which must be alleged. They are always indispensable, but the conclusion may be omitted. Now, taking the case at bar, it seems to the court that the affidavit states a conclusion without the facts. If we reverse it, if the affiant had given facts omitting the conclusions, the court and jury could ascertain whether the acts alleged to have been committed by this woman were or were not "indecent conduct." Instead of that, the affiant assumes the power to determine them for himself.

Another decision to the same effect is that of *Arata v. State*, 12 Dec. 730. The first proposition of the syllabus reads as follows:

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"An affidavit which is so drawn that the act set forth therein may or may not be an infraction of law, so that it is necessary to wait until the prosecution has introduced its evidence before the defendant can know whether or not he must make any defense, is fatally defective."

A case that arose in Sandusky county some years ago and went to the Supreme Court, is also pertinent upon this question. It is the case of *Whiting v. State*, 48 Ohio St. 221 [27 N. E. Rep. 96].

It was suggested in the argument of this case that perchance the acts claimed to be "indecent," were of such a nature that it would be improper to set them forth in an affidavit. If that were true, the fact excusing the setting of them forth should be stated in the affidavit. That is stated in pursuance of the doctrine announced in *State v. Zurhorst*, 75 Ohio St. 232 [79 N. E. Rep. 238; 116 Am. St. Rep. 724], which was a case that went to the Supreme Court from Erie county. The defendant was indicted for having in his possession certain pamphlets alleged to be "indecent and immoral" and the indictment proceeded to state that they were too obscene to set forth in an indictment; and the Supreme Court held that that having been pleaded in the indictment was sufficient excuse. But in the case at bar there is no excuse given for failing to set forth the facts in the affidavit. Certainly there could have been some intimation given of what acts this defendant was charged with. The opinion of the court therefore is that this affidavit is not sufficient in law to have placed the defendant below upon trial.

There is another matter that perhaps is unnecessary to determine, but it is simply passed to me to indicate an opinion upon the case because I cannot foresee what might happen in the future as to the alleged offense of the defendant.

In the trial of this case to the jury there was introduced in evidence what purported to be a confession of a man by the name of Zerker, and it seems from the record introduced that he had been arrested and had pleaded guilty to the commission of acts which constituted "indecent conduct," before this same judicial officer; and it appears that these acts were committed upon the same occasion as the ones with which this defendant is said to be charged, and the record of that plea of guilty, that confession of Zerker, was introduced in evidence and read to the jury in this case apparently for the purpose of convincing the jury, that because Zerker had admitted his guilt therefore the defendant, Mrs. King, was also guilty. The court is not able to take that view of the matter. It does not appear that these persons were charged with conspiracy, and if they had been, the statement or admission of the offense of one of them would not be admissible against the other one unless made during the pendency of a conspiracy and in furtherance of it; and under the circumstances of this case, it could not fail to have been prejudicial to the defendant below

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to have read to the jury the confession of Zerker. See *Kazer v. State*, 5 Ohio 280; *Patton v. State*, 6 Ohio St. 467; Elliott, Evidence Sec. 2943 and 2944.

It follows that the motion to strike the bill of exceptions from the files will be overruled, and that the judgment of the court below will be reversed at the cost of the defendant in error and the plaintiff in error discharged.

I might say that the main controversy in this case, being in regard to the affidavit, did not depend upon the question whether the bill of exceptions was properly here or not.

BANKS AND BANKING—FALSE PRETENSES.

[Huron Common Pleas, March 15, 1909.]

STATE OF OHIO V. WILLIAM PERRIN.

1. TITLE TO MONEY DEPOSITED WITH BANK OBTAINED BY FALSE PRETENSES PRIMA FACIE PASSES TO BANK.

In an indictment for obtaining money by false pretenses where it is charged that by reason of certain false pretenses the money was deposited with a bank, it will be held to have been *prima facie* a general deposit, whereby the title would pass to the bank.

2. DIRECTOR INDUCING BY FALSE PRETENSES DEPOSIT OF MONEY IN BANK OBTAINS SAME THOUGH NOT PERSONALLY RECEIVED BY HIM.

If the defendant by means of false pretenses with intent to defraud has induced the prosecuting witness to deposit money in a bank of which the defendant is a director, he has obtained the money within the meaning of Sec. 7076 Rev. Stat., although he does not personally receive the same.

[Syllabus approved by the court.]

D. J. Young, Pros. Atty., for plaintiff.

C. P. Wickham and A. M. Beattie, for defendant.

RICHARDS, J.

This case, together with three others against the same defendant, has been submitted to the court upon a motion to quash the indictment. The questions are the same in all of them and they will be disposed of together.

Each indictment charges that the defendant knowingly made certain false pretenses regarding The Ohio Trust Company of which he was a director; that the pretenses were made in each case to the prosecuting witness by which he was induced to deposit certain money, named in the indictment, with The Ohio Trust Company.

The indictment further charges that the defendant did then and there and thereby unlawfully obtain from the prosecuting witness said money with intent to defraud him. The falsity of the pretenses is

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sufficiently set forth by an appropriate negative averment contained in the indictment.

Various grounds are set forth in the motions to quash filed in these several cases, some of which grounds have been argued and others submitted without argument.

It is urged among other things, as a reason why this indictment ought to be quashed, that the indictment avers that this money was deposited with The Ohio Trust Company, without other description of the manner or method of the deposit, and that this made a special deposit, in which the title would not pass to the Trust Company, and unless the title passed, there would not be any obtaining of the property within the meaning of the statute.

It is, however, the law, that where a deposit is averred to have been made, it means a general deposit; that is the presumption, and is the ordinary method of making deposits in a banking institution. If any other kind of a deposit were claimed to have been made, it should be specially set forth what sort of a deposit it was; but when the general language is used in an indictment as in this case, the presumption is, that the deposit was a general one, made by the prosecuting witness in his own name. That doctrine is specifically announced by the Supreme Court in the case of *Bank v. Brewing Co.* 50 Ohio St. 151, 159 [33 N. E. Rep. 1054; 40 Am. St. Rep. 660].

The indictment in this case is drawn under Sec. 7076 Rev. Stat., and under the first part of that section, which reads:

"Whoever by any false pretense, with intent to defraud, obtains from any person any thing of value," etc.

It is contended in support of the motions to quash these indictments that within the language of this section, the property, if obtained at all, was not obtained by the defendant, and that therefore, the indictment does not charge an offense under the statute.

It appears by the indictment, that the money was in fact deposited by the prosecuting witness with The Ohio Trust Company.

It is argued with a great deal of force, and the argument is sustained by authorities that are convincing to this court, that, by virtue of the deposit, a director has no control, in the sense that he may dictate, or direct, or handle the fund so deposited. He cannot receive a dollar of it and he would have no authority individually to control it, but that does not fully answer the problem that is to be decided in this case.

The language of the statute is, "obtains," and while, as I have said, a director, by virtue of the deposit, certainly would not receive this fund, would not be able individually to control it, yet the question still remains whether, within the meaning of the statute, the property

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has been by him "obtained." "Obtain," as I understand it, means to get by effort, to procure. Neither the title nor the possession of this money, under the averments of the indictment, passed to the defendant. He did not, therefore, receive it. Nevertheless, in the opinion of the court, he did, within the meaning of this statute, obtain it, although the bank received it. If I solicit, successfully, the appointing power in behalf of my friend, I obtain the appointment, but the commission, on being delivered, is delivered to my friend, and he receives the appointment. I think that distinction is applicable to the cases now under consideration. Especially is that true when we consider the object of this statute, which is, to make unlawful the defrauding of another by false pretenses. What, then, are the elements of the offense? They are, false statements knowingly made, and something of value parted with upon the faith of them. The state is not so much concerned as to who derives the benefit, as it is that by means of false statements, knowingly made, the prosecuting witness has been deprived of his property.

It seems to the court then, that if the defendant made the false pretenses knowingly and thereby induced the prosecuting witness to deposit money in this bank, the defendant obtained it, within the meaning of the statute. I reach that conclusion upon considering the objects and purposes of the statute, and the meaning of the word "obtain." Undoubtedly, under ordinary circumstances, a man, when he obtains an article, receives it; but I am convinced that the reception is not the essential part of the obtaining; that if, by the efforts and representations of a party, another is induced to part with his property, then that property has been obtained, within the meaning of this statute, although the title to it may not pass to the person who made the representations.

What say the authorities upon this question? They are not uniform and it would be impossible to reconcile all of them. I have examined a great many and it seems to me that the greater weight of the authorities is decidedly in favor of the view which I have taken.

Counsel have not furnished me with any reported Ohio case in which this expression has been construed. There is, however, a common pleas decision in which the word "obtain" is construed, as embraced in Sec. 7088 Rev. Stat. The case to which I refer is from the Hamilton county common pleas, *State v. Hofman*, 2 Dec. 206 (1 N. P. 290). I read from the final paragraph of the decision of Judge Wilson:

"It is alleged against this indictment, on both counts, that there is no allegation that the defendant intended to obtain this money for himself. The statute says, 'whoever writes part of a written instrument with intent to obtain anything of value.' It does not say for whom the property should be obtained."

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A very instructive case from Massachusetts may be found, *Commonwealth v. Langley*, 169 Mass. 89 [47 N. E. Rep. 511]. The second proposition of the syllabus reads:

"Where the officer of a corporation, by false and fraudulent statements, induces certain persons to purchase worthless stock in the corporation, he is guilty of obtaining money under false pretenses, though the title to the money obtained passed to the corporation."

It may be said regarding this case, that the possession passed to the defendant, and the title only, passed to the corporation of which he was an officer. So that while there is that difference between *Commonwealth v. Langley*, and the case under consideration, yet I do not regard the difference as of any great consequence for it is the obtaining of the title that constitutes the offense. *State v. Balliet*, 63 Kan. 707 [66 Pac. Rep. 1005], is directly in point. I read from page 1006:

"The legal title to the land stood in the name of one May Murphy, and the bill of sale of the goods, at the request of the defendant, ran to her, although it did not appear that she personally participated in the trade. She was present, however, at the time the inventory of the goods was taken, and gave some clerical assistance therein. It is claimed that there was a fatal variance between the allegations of the information and the proof offered in support thereof in that, the bill of sale being made out in the name of Miss Murphy, a presumption arises that the transaction was for her benefit, and, if it was, counsel claim that defendant could not lawfully be convicted under an information which failed to charge any conspiracy between himself and Miss Murphy, or that the arrangement between them was fictitious, and made to deceive John and Thomas Truex. The defendant requested an instruction to that effect, which was refused, but the court did advise the jury that, if the defendant 'obtained from said John Truex and Thomas Truex the goods and merchandise described in the information, then it is not necessary for the state to prove that the defendant so obtained said goods for himself or on his own account, or that he derived or expected to derive any personal or pecuniary benefit from the transaction.'"

After the case had been submitted, the jury requested further instructions with reference to the matters referred to in the language quoted, and the court defined the word "obtained" as follows:

"The word 'obtained,' as used in these instructions, means to get hold of, to get possession of." The next morning the jury were brought in, and the court gave them the following additional instruction, which appellant strenuously contends to be erroneous: "In order to find that the defendant obtained the goods and merchandise charged in the information, it is not necessary that you should find that he furnished the consideration for the transfer, or that the title to such goods and

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chattels passed to or vested in him. It is sufficient if he obtained the possession or control of such goods and merchandise, or that such goods and merchandise were delivered to another at his request, or in accordance with his wishes."

That is precisely the question which we now have under consideration. After citing some authorities, the court proceeds:

"If the false pretenses of the wrongdoer are such as to deprive the person from whom the money is procured of his money, then money is obtained by false pretenses, and a crime is committed. If, in other words, the wrongdoer does make such false pretenses as induce another to part with his money or property, that money or property is obtained from the owner by false pretenses, because he is deprived of it by criminal means and methods. The law does not make an element of the offense of obtaining money or property under false pretenses that it shall be obtained for the person making the pretenses himself, or that it shall be intended to obtain it for another; for it is provided that 'whoever shall obtain money or property' by false pretenses, shall be guilty of a felony."

The charge in that case, as ultimately given to the jury raises, as I have indicated, the identical question that we have here.

Another case to which I call attention is *Musgrave v. State*, 133 Ind. 297 [32 N. E. Rep. 885]. That was a case in which certain parties sought to defraud an insurance company by certain false representations, and the defrauding, if successful, would have been for the benefit, not of the parties making the representations, but for the benefit of the mother of one of the parties. In the course of the opinion, beginning at the bottom of page 888, the court use this language:

"It can make no difference that the direct and immediate object of the conspirators was to obtain money for the beneficiary in the policy, for the gravamen of the offense consists in the felonious purpose to defraud another out of money or property. It would avail a thief nothing to aver that he stole property for his mother, and no more can it avail the accused to aver that he made the false pretenses of his death to secure a benefit to his mother. The object of the statute is to protect persons from being defrauded by false pretenses, and to punish those who attempt to secure money or property by such pretenses, or who do so secure it."

I cite also, *Sandy v. State*, 60 Ala. 58, 60; *State v. McGinnis*, 71 Iowa 685 [33 N. W. Rep. 338].

The general doctrine upon the question now under consideration is laid down in 19 Cyc. Law & Proceed. 409, and in 12 Am. & Eng. Enc. Law (2 ed.) 826, 827.

These text-books cite some cases that maintain the opposite of this position, and, among others, are *People v. New York County Court*,

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13 Hun 395, and *Willis v. People*, 19 Hun 84, which I have not been able to examine; but those cases must be construed in connection with a later decision contained in the New York Supplement which has been affirmed by the court of appeals of New York, without report. See *People v. Moran*, 43 N. Y. App. Div. 155 [59 N. Y. Supp. 312], affirmed, without report, *People v. Moran*, 161 N. Y. 657 [57 N. E. Rep. 1120]. See also, *Bracey v. State*, 64 Miss. 26 [8 So. Rep. 165].

I think that, clearly, reason is in favor of construing this statute to mean that the obtaining has been accomplished when, by means of false pretenses, with intent to defraud, a prosecuting witness has been induced to part with the title to his property to anybody, and the greater weight of authority certainly maintains that view.

Various other grounds are stated in these motions to quash the indictments, but I think none of them are well taken and it follows therefore, that the motions to quash will be overruled.

WILLS.

[Geauga Common Pleas, February, 1909.]

EVA CRAFTS V. CLARA A. WILBER, EXRX.

WILL DRAWN ON PAGE OF ONE SHEET BLANK NOT INVALIDATED BY SIX INCH SPACE BETWEEN DISPOSITIVE AND TESTAMONIUM CLAUSES.

A will entirely drawn upon one page of a printed blank form of one sheet, in which after the printed form at the beginning thereof is written the dispositive clause disposing of testator's property and his executor is named, then follows a space of some six inches between that and the testimonium clause and directly under the testimonium clause in the space provided is signed testator's name, followed by the attesting clause, signed by the witnesses, is signed at the end thereof as required by Sec. 5916 Rev. Stat.; the will otherwise appearing regular and no claim being made of interlineation, alteration or interpolation, its validity will be sustained.

[Syllabus approved by the court.]

H. O. Bostwick, for plaintiff.

G. W. Alvord and H. L. Williams, for defendants.

REYNOLDS, J.

This case is brought by Eva Crafts, the plaintiff, against Clara A. Wilber and Clara A. Wilber as executrix of the will of George O. Wilber, which case is known in law as a contest of will. It appears that sometime in February, 1908, the decedent, George O. Wilber, died, and that afterward, his will, or what purported to be his will, was filed in the probate office in this county, and afterwards admitted to probate there. The issue that is made here is solely on one matter. There is no issue made but what the decedent, at the time that he signed the will, had the capacity to make the will, and that the signature pur-

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porting to be his on the will is his signature, and the will was signed in the presence of two witnesses, who signed it in his presence as provided by the statute, and that it was properly signed by the witnesses.

The sole question made in this action is that the will is not signed at the end of the will as provided by the statute. The will itself was drawn on the printed blank such as is in common use, of one sheet, and all drawn upon one page. After the printed form at the beginning of the will there is written the dispositive clause in which he disposes or undertakes to dispose of his property, and names an executrix of his will. After that there is a space of some six inches between that and what is commonly known and called the testamonium clause. Directly under the testamonium clause in the space provided, the decedent, George O. Wilber, signed his name. Under that is the attesting clause signed by the witnesses.

The plaintiff's claim is, that because of the intervening space between what is written in the will, and where the decedent signed his name under the testamonium clause, the will, on its face, was not signed at the end as provided by statute. In other words, that there is so much space between the dispositive part of the will and where he signed, that the statute is not complied with.

So far as appears from the will itself it is regular. I mean to say by that, there is nothing that appears, neither is there any claim made by the plaintiff, that there has been any interlineation or alteration or interpolation. The question is an interesting one, and a question that has occupied the attention and consideration of courts at different times, and especially of later years. I do not remember now of ever having had my attention called to it before, notwithstanding I have had something to do with wills, or that such a question was ever made in the courts of my own county, at least since I have been at the bar. Quite a large number of authorities have been presented to the court on this matter but a good many of them, in fact the larger share of them, do not help very much on the question at issue. I mean by that, that something else has transpired or occurred in the execution of the will which has been the turning point in the decision of the courts.

The state of New York has a statute very much like our own, in fact I presume our own statute was copied largely from that of New York. In *In re Will of O'Neil*, 91 N. Y. 516, where this matter was considered, and this question treated, there were other irregularities. In that case it appears a printed blank was used, and it was a printed blank such as is sometimes used, where there are several pages; the testamonium clause of the will was at the foot of the third page. The entire blank space in the will was filled with writing, and there was carried over a portion of the dispositive clause that contained material provisions, to the top of the fourth page. The name of the testator

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and the name of the witnesses were written at the bottom of the third page. There was nothing in this paragraph that was carried over to the fourth page to show that it had any reference, or was in any way connected with what had gone before. So that when the court came to consider that case it was very evident to the mind of the court, that the will was not signed at the end thereof, for the reason that a material part of the will was carried over to the fourth page, written after and below where the testator had signed.

That was also true in the case of *Conway, In re*, 124 N. Y. 455 [26 N. E. Rep. 1028; 12 L. R. A. 146], where a blank form was also used, and the blank form was upon one side of the paper, but on that sheet at the end of the last line there was interlined "carried to the back of the will" and upon the back of that sheet was written the word "continued." Now the testator signed on the first page, and a part of this was carried over after the testator had signed, on the back of the page. It was very evident to the court that the testator had not signed at the end of the will.

In *Whitney's Will, In re*, 153 N. Y. 259 [47 N. E. Rep. 272; 60 Am. St. Rep. 616], a printed blank was used with only one page, and at the bottom of the page the testator signed, and the subscribing witnesses, and in that will there was carried over onto another sheet a portion of that will written on a separate piece of paper attached to the face of the blank, and it was very clear to the court that the testator had not signed at the end of that will.

In *Andrews' Will, In re*, 162 N. Y. 1 [56 N. E. Rep. 529; 48 L. R. A. 662; 76 Am. St. Rep. 294], a printed blank was used which consisted of a sheet of four pages. This was a very singular blank, as it appears to us. The formal opening or part of the will, was printed on the first page, leaving the rest of that page blank, and on the top of the second page was the attesting clause. Now in writing the will the scrivener, after writing on the first page, had gone over to the third page after the attestation clause, and from there went back to the second page. The testator and witnesses had signed the attestation clause on the second page, and it was very evident in that will that a material part of that will had been written following the signature of the testator; and that he had not signed at the end of the will, although in all those wills perhaps, as has been said by the courts, the testator supposed he was signing his will and had such an intention, but it was very evident, and was clear, that he had not signed at the end of the will. Now all of those New York cases that we have been able to find, are in that condition, so that we do not have in any of those cases the exact question which is made here.

In our own state quite early this question came up. In *Glancy v. Glancy*, 17 Ohio St. 134, the question arose as to what was meant by

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signing at the end thereof as required by the act relating to wills. The will in this case was drawn up on a sheet of letter paper filling two pages, and the will concluded at the end of the second sheet, and after the testimonium clause the testator signed, then the attestation clause was signed by the witnesses; but after that, and on the top of the third page the testator wrote the following:

"N. B.—Should my wife have more heirs by me they are equally in all at the same time the others do."

There was an evident disposition to make another provision, and it was after the disposing part of his will, underneath this the witnesses signed, but not the testator, so the court said, and was evidently right about it, that the testator had not signed at the end of his will. So that the identical question presented in this case does not appear here.

In *Baker v. Baker*, 51 Ohio St. 217 [37 N. E. Rep. 125], after the decedent had signed, so far as appears, at the end of the testimonium clause, and it had been witnessed, he wrote these words: "My sister-in-law is not required to give bond when probated." Now the court in disposing of this case said that they did not think that what was written after the signature of the testator invalidated this will. In other words that it was not an essential part of the will, and the rule would not apply. Now if an addition can be made to the will after the testator signed which does not affect the disposing part of the will—in other words is not a dispositive clause, then a testator might with equal safety write in other things if he saw fit, above his signature, other suggestions of greater or less length, other than of a dispositive nature, so that while it might not affect the question materially, necessarily the decedent or testator would not be obliged to sign immediately under the disposing part of the will; there might be other things said in his will after the disposing part, and not affect the validity of the will.

This case that is referred to, *Mader v. Apple*, 18 Dec. 801 (6 N. S. 592), is a late decision, made in February, 1908, by the judge of the court of common pleas of Shelby county. It seems that the question was made there, and evidently many authorities were presented on both sides. There was a will in which was used a printed blank form, not, however, just like the one in question that we have before us, as that was a double sheet, in which I think it appears that the testimonium and attestation clause was at the end of the third page, very much space intervened, twenty-three and a half inches or such a matter, between the disposing clause written in the will and where the testator signed at the end of the testimonium clause. Judge Mather, in his decision, indicated that the law that governed him in the decision very much were the decisions in *Irwin v. Jacques*, 71 Ohio St. 395 [73 N. E. Rep. 683; 69 L. R. A. 422], and *Sears v. Sears*, 77 Ohio St. 104 [82 N. E. Rep. 1067]. I might say, before passing to that, however, that in the case

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cited by counsel, *Willis v. Low*, Robinson's Ecclesiastical Report, which is an English case, it is very evident to counsel and the court that the court was holding very close to the technicalities of the law. This was a case in which some three pages had been used. At the bottom of the third page there was sufficient room, consisting of something like eight-tenths of an inch, as we recall it, where the testator might have signed, and where there was room also for the attesting witnesses to sign. They did not, however, sign at the bottom of that page, but going over on the fourth page and partially opposite the attesting clause, the testator signed, and that court held that it was not signed as provided by their statute of wills, at the end or foot thereof. In the note that is cited in that case, *Willis v. Low*, *supra*, the will was written on the first page and part on the second page, and then quite a blank space intervened between what was written on the second page and the bottom of the second, being nearly four inches, the scrivener then passed to the third page and without commencing on the top of the third page dropped down some two or three inches, then wrote the testimonium clause and the testator signed; I am inclined to think if I recollect, that so far as appears in that case the testator and witnesses all signed at the end of the attestation clause. It does not appear that a printed blank form was used but it was written by the scrivener. Now, as to the cases in Ohio, *Irwin v. Jacques* and *Sears v. Sears*, *supra*: First, in *Irwin v. Jacques*, there were two irregularities apparently in this case. First, the testator did not sign the will at the end of the testimonium clause, but there was a blank space between the testimonium clause and attestation clause of some length, an inch or two evidently left for the testator to sign, and which space he did not use for that purpose, but did sign at the end of the attestation clause. Not very much is said about that, however, in this case, but the case seemed to turn very largely on a disposing part of the will that was written on the margin and opposite the end of the will, or testimonium and attestation clauses; and this marginal reference was evidently a disposing part of the will. It was not connected, so far as appeared by the will, in any way with the body of the will written in the ordinary place for writing the will. Not connected by any mark or sign, or any indication whatever that it had anything to do with the rest of the will. More than that, this was written on the margin below even where the testator signed, at least a portion of it, or at the bottom of the attestation clause and the court held that because of that fact, the will was not signed at the end as provided by the statute. The court says:

"The lower end of the clause is an inch or more below and to the left of the name of the witnesses, and three inches below and to the left of the signature of the testator."

This case seemed to hinge and turn upon that question, as I said,

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and very little, if anything, was said about the fact that the testator did not sign at the end of the testamonium clause but at the end of the attestation clause, so that case, in our judgment does not help the court very materially in this case at issue.

Now, coming to *Sears v. Sears, supra*, which, so far as we know, is the last utterance of the Supreme Court of this state on this question. We find a case like this: Here was a will that was written, and between the last of the disposing part of the will as written by the scrivener and the testamonium clause was a space of something like six inches, as said by the court. Then follows the testamonium clause. The testator did not sign at the end of the testamonium clause but after the attestation clause the testator signed. The court goes into a learned discussion of the law on this question in other states and in England, and also regarding the question that is treated by Judge Mather, and which has often been referred to as to the intention of the testator not governing, but what was the intention of the legislature, in the act itself. We call attention of counsel to what the court in this case said, about intention, with relation to what in fact was the end of the will. Whether in fact the end of the will is at the end of the disposing part of the will, or at the end of the testamonium clause. So far as we have been able to discover the court nowhere, in this case of *Sears v. Sears, supra*, intimates otherwise than that if the testator had signed that will at the end of the testamonium clause it would have been a valid will, notwithstanding the fact, that as much space intervened between the disposing part of the will and the testamonium clause, as appears in the will before us. Nowhere do we find in that case, and we have read it carefully, and if there is anything we failed to find it, that the court intimates that it would in any way affect the validity of the will, the fact that there was a blank space between the disposing part and testamonium clause. Now the court said, and we call attention to the matter of intention in *Sears v. Sears, supra*, on page 127:

“In the case before us the will is not signed by the testatrix at the end thereof.”

The testamonium clause is as follows:

“In testimony whereof, I have set my hand to this my last will and testament at Lakewood, Ohio, this sixth day of June, in the year of our Lord one thousand nine hundred and three.”

Then follows a blank space with a dotted line evidently intended for the placing of the signature of the testatrix, which does not appear there. The court says:

“The obvious purpose for which this blank line was left was for the signature of the testatrix, and it was intended as the end of the will. The absence of her signature there not only discloses that the

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will is not signed by her at the end thereof, but also implies that she did not sign it at all."

So that to us it seems the court has very clearly indicated that the end of the will as intended by the testatrix was at the end of the testimonium clause; and as we have said, notwithstanding in this will there appeared to be a blank space of six inches between the end of the disposing part of the will and the testimonium clause.

How the court in Shelby county could have used that on which to base his decision we are unable to see.

It might be contended that it would make no difference whether there was a space of one inch or twenty inches between the end of the disposing clause and testimonium clause, yet it might make some difference. In the words of the Supreme Court perhaps in *Baker v. Baker, supra*, the court used the word the will was signed in *substantial* compliance with the statute, and that may have been what the court meant by this. Now under that decision of the case of *Sears v. Sears, supra*, taking the will before us, written on the first page and entirely written on the first page, evidently regular on its face, with no interlineations or additions, alteration or interpolation, with no more space intervening than evidently intervened in the case of *Sears v. Sears* between the disposing clause and testimonium clause, and where that case seemed to turn entirely upon the fact that the testimonium clause was as the court said, the end of the will, and that the testatrix did not sign it there and therefore did not sign it at the end of the will but after the attestation clause, that not appearing here, we are unable to see how the law in this state would lead us to sustain this motion. We may be wrong about it, if we are, the parties have their remedy, and we overrule the motion.

Thereupon contestant offering no evidence the court directed a verdict for defendant sustaining the validity of the will.

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ATTORNEY AND CLIENT.

[Richland Common Pleas, September Term, 1908.]

Nicholas, Seward and Wickham, JJ.

IN RE GEORGE MOREHOUSE.

1. **EVIDENCE TO DISBAR ATTORNEY MUST BE CLEAR, CONVINCING AND SATISFACTORY.**
The importance of the office of attorney at law demands that no one shall be deprived of his office for light and trivial offenses, nor for more serious and grave offenses except upon clear, convincing and satisfactory evidence.

2. **CERTIFICATE OF ATTORNEY TO PRACTICE IS VOUCHER OF SUPREME COURT OF LEGAL ABILITY AND MORAL CHARACTER.**

The certificate of admission to the bar is a voucher by the Supreme Court of the good moral character of an attorney, his competency to give advice in legal matters and conduct legal proceedings of attorneys; and that he will deal with his clients with honesty and fidelity to their interests; the public is entitled to so understand its intendment and rely upon the court's indorsement of such qualities; and upon a court's being informed that one does not possess these requisite characteristics its duty is to remove him from such office. The bar, likewise, are bound to see to it that the attention of the court be directed to the removal of unfit and unworthy members.

3. **MISCONDUCT IN OFFICE OF ATTORNEY.**

The retention for four months by an attorney of money of his client without excuse or right to do so, in face of repeated demands upon him for it is misconduct in office.

[Syllabus approved by the court.]

H. T. Manner and A. S. Beach, for plaintiff.

H. L. McCray and J. P. Seward, for defendant.

WICKHAM, J.

This is a disbarment proceeding. In compliance with an order of this court, H. T. Manner and A. S. Beach, members of this bar, filed a complaint on September 8, 1908, charging George Morehouse, an attorney at law and member of the bar of this county, with misconduct in office. The matter constituting the alleged misconduct, as charged in the complaint, is, in substance, that in November, 1906, while acting in the capacity of an attorney for an old lady whose name is Mercy Boyce, the respondent received from the probate court of this county the sum of \$350, which was the money value of her inchoate right of dower in certain lands, sold by order of said court, in a suit brought for that purpose by the guardian of her husband, Josiah Boyce, an imbecile; that the respondent, although frequent demands have been made upon him by his client, has failed and refused to pay or account to her for the money so received, or any part thereof.

We approach the consideration of this case, and the other cases submitted to us, with a profound sense of their importance. They are each of the greatest importance to the respondents respectively, for

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they involve their right to follow their chosen vocation in life to maintain themselves and their families; and the right to be known as members, and to exercise all the rights and privileges of the honorable profession of the law.

We recognize that no one possesses the requisite educational qualifications of admission to the bar of our state without years of laborious study; that the time, labor, and expense required to fit one for the bar, makes the office of attorney of great importance, and no one should be deprived of his office for light and trivial offenses; nor for more serious and grave offenses, except upon sufficient evidence. To be sufficient, the evidence should be more than a mere preponderance; it should be clear, convincing and satisfactory.

On the other hand, we realize the importance of the cases to the public, to the bench, and to the bar of the state. Applicants for admission to the bar of our state must not only possess the required educational qualifications but they must also show that there is conjoined with knowledge and skill, that ancient requirement of the law—integrity of character. When an applicant has satisfied the examining committee, by recommendation and examination, that he possesses these qualifications, and is recommended to the Supreme Court for admission, the court administers to him an oath to support the constitution and laws of the United States and the state of Ohio, and to honestly demean himself in office. He then receives from the clerk of our highest judicial tribunal a certificate, that the applicant named therein is a person of good moral character; that he is competent to give advice in legal matters and to conduct legal proceedings. The certificate of good moral character is a voucher by the Supreme Court that the attorney will deal with his clients with honesty and fidelity to their interests. It is intended to be so understood by the public. They have a right to rely on the court's indorsement of the attorney for honesty and integrity. In his employment, the attorney is often intrusted by his client with interests of the highest character. It involves life, liberty, property, and domestic relations. It is indispensable that the attorney be trustworthy, and of unswerving integrity of character in his official relations; that he keep faith with his client and betray no confidence. In these things the public have the right to be protected. Justice to the court, and the honor of his profession, demand that he act with fidelity and honesty with the interests intrusted to his care. If he fall short of this, and shows by his conduct that he does not possess these requisite characteristics, it is the plain duty of the court, when so officially informed, to remove the attorney from his office, to the end that the public may be so protected from imposition, and the integrity and honor of the profession may be maintained.

These general observations apply to all the cases submitted to us.

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They embody principles that have been announced and adhered to by the courts of most of the states of this country from time immemorial. The adjudicated cases speak as with one voice in their proclamation. They are so well supported by reason and necessity, that we apprehend their correctness would not be questioned by any lawyer worthy of the title.

At this point it may not be amiss to say that it is a duty devolving on the members of the bar to see to it that no unfit or unworthy member be permitted to remain in their ranks, without bringing the matter to the attention of the courts. They owe this duty to themselves as members of the bar and officers of the courts, and to the profession at large; for it is only by the elimination of the delinquents that we can preserve the administration of justice, the purity of the courts, and maintain the high standing of the legal profession—essential elements of civilized society.

On a consideration of the evidence of the case in hand, we find that late in November, 1906, the respondent, George Morehouse, received from the probate court of this county the sum of \$350, which was the value of Mrs. Boyce's inchoate right of dower in the lands belonging to her husband, which had recently theretofore been sold. The fact that he received the money is admitted by him. Soon after the receipt of the money by Mr. Morehouse, Mrs. Boyce and Mrs. Williams appeared at his office. Mrs. Boyce testifies, and she is supported by the testimony of Mrs. Williams, that she then and there demanded the money from Mr. Morehouse. This is denied by Mr. Morehouse, who claims that the money was left with him for safe-keeping. Mrs. Boyce made frequent visits to the office of Mr. Morehouse from about December 1, 1906, to March 25, 1907. She so testifies and her testimony is corroborated by Mrs. Williams. She says that the purpose of her visits at the office of Mr. Morehouse was to secure the money due to her from him. Mr. Fritzinger, the witness called by Mr. Morehouse, says in his testimony that both Mrs. Boyce and Mrs. Williams were at Mr. Morehouse's office several times that winter, and Mr. Morehouse himself says in his testimony, in substance, that he was greatly annoyed by Mrs. Boyce's visits both before and after March 25, 1907.

The fact is well established that she was there many times between the receipt of the money by Mr. Morehouse and March 25, 1907, and that she was there to get the money due to her from Mr. Morehouse we think there can be no question. There is no evidence to show that she was there for any other purpose. There was no business of hers in the hands of Mr. Morehouse that would call her to his office. The fact that she was there many times for her money between those dates is inconsistent with the claim of the defendant that he had her money for

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safe-keeping and was ready and willing to turn it over to her at any time she demanded it.

We are satisfied from the evidence that the testimony of Mrs. Boyce and Mrs. Williams, in regard to the statements made by Mr. Morehouse to Mrs. Boyce early in December, and the frequent demands made upon him by Mrs. Boyce for the money, are true, and we have no difficulty in finding, in view of all of the circumstances of the case, that after receiving her money Mr. Morehouse appropriated it to his own use, and when she called for it he was unable to pay it to her. According to his own statements and admission, and accepting for the purpose his version of the facts, he has \$150 of her money which he has never offered to pay, nor any part thereof, since March 25, 1908.

Mr. Morehouse claims that he borrowed the \$350 of Mrs. Boyce on March 25, 1907, for one year. This is denied by Mrs. Boyce, and the evidence shows that she was a frequent caller at his office after that date, demanding her money.

We are of the opinion that there was no loan of the \$350 to Mr. Morehouse on March 25, 1907. That Mrs. Boyce frequently demanded payment after that date is admitted by Mr. Morehouse, and he wrote two letters to her in which no mention is made of the loan of the money. We cannot conceive why Mr. Morehouse, if he was unable to pay the money in July and August of 1907, did not mention the fact of the loan in the letters, if he had borrowed the money. If he had in fact borrowed the money of her, the best excuse in the world for not paying her after that date would be that he had borrowed it for one year and was not bound to pay it until the year had expired.

The execution of the written instruments called receipts, introduced in evidence, is involved in more or less uncertainty. Mrs. Boyce is positive that she never received the so-called "first receipt." Mr. Morehouse squarely contradicts her in that respect. The fact that the so-called "second receipt," given March 25, 1907, bears date December, 1906, is not satisfactorily explained. But however the fact may be in regard to the execution of the receipts, we are satisfied on the whole case that Mr. Morehouse, at least from November, 1906, to March 25, 1907, was guilty of failing to pay to his client the money that had been collected by him for her, and therefore is guilty of misconduct in office.

The retention of money of his client by an attorney for four months, without any excuse or right to do so, in the face of repeated demands upon him for it, is misconduct in office. And upon the question of the loan we find that there was no loan, and consequently Mr. Morehouse was guilty of misconduct in office after March 25, 1907; and in fact, as we have before stated, has been guilty of failing to pay Mrs. Boyce, according to his own claims, the \$150 which he does not deny has been due her, since March 25, 1908.

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In determining what judgment should be rendered in this case we have taken into consideration that there is but a single charge against the defendant. If he had told the truth upon the witness stand, as we believe it to be, he would have stood in a better light before the court. But notwithstanding that, and in view of all of the facts and circumstances of the case, the judgment of the court is that he be suspended from the practice of the law for the period of one year from this date, and pay the costs of the prosecution of the charge.

I am compelled to say that our finding and judgment in this case is that of a majority only of the court. One of our number is of the opinion that the evidence is insufficient to warrant a finding of guilty of misconduct in office, and he therefore dissents from the judgment of the majority of the court.

Seward, J., concurs.

Nicholas, J., dissents.

COLLEGES AND UNIVERSITIES—TAXATION.

[Knox Common Pleas, May Term, 1908.]

*KENYON COLLEGE v. JOHN K. SCHNEBLY, Tr.

1. COLLEGE PROPERTY TO BE EXEMPT FROM TAXATION SHOULD BE USED EXCLUSIVELY AS SUCH.

Section 2732 Rev. Stat., exempting from taxation "all public colleges * * * all buildings * * * lands connected with public institutions of learning, not used with a view to profit," requires that the property be used exclusively for educational purposes. Hence, property used for residence purposes by college professors, vacant lots, unproductive woodlands, agricultural lands, pasturing lands, are not exclusively educational uses and are not exempt from taxation; nor is a water pumping station supplying water to residences of college professors and others.

2. PREPARATORY SCHOOL PROPERTY NOT TAXABLE.

A contract by which certain persons were to take charge of and conduct a grammar school and preparatory department for a college and pay the college a stipulated sum yearly, and encourage students subsequently to attend the college, the college also applying part of the money received from such students for improvements, etc., on the property, is not a contract with a view to profit on the part of the college within the meaning of Sec. 2732 Rev. Stat. and such property is not taxable.

[Syllabus approved by the court.]

H. H. & R. M. Greer and T. P. Linn, for plaintiff.

W. A. Hosack, for defendant.

WICKHAM, J.

This action was brought by the plaintiff to enjoin the defendant, as treasurer of Knox county, from collecting the taxes, penalty and interest on twenty-three separate tracts or parcels of real estate belong-

*Modified, *Kenyon College v. Schnebly*, 31 O. C. C. 150 (12 N. S. 1).

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ing to the plaintiff, which the auditor of the county placed on the tax duplicate, with one or two exceptions only, for the years 1901 to 1907, inclusive.

It is the claim of the plaintiff that the several pieces of real estate described by it in its petition are exempt from taxation; the defendant, as treasurer, claims that it is all taxable. A temporary injunction was granted at the time the suit was commenced, and the defendant was temporarily restrained, as prayed by the plaintiff, and the cause is now submitted to the court on its merits.

The statute under which the plaintiff claims the property described in its petition to be exempt from taxation is that part of Subd. 1 of Sec. 2732 Rev. Stat., which is expressed in the following language:

"All public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning, not used with a view to profit."

The classes of property that are made exempt from taxation by this language are:

1. All public colleges or academies.
2. All buildings connected with the same.
3. All lands connected with public institutions of learning, not used with a view to profit.

The legislative intent of the language describing the first class is not easily discerned. A college is not a corporal thing; it is a corporation. It is intangible; it is only its property that is tangible, and it is only tangible property that is taxable. It would be ridiculous to speak of a levy of a tax on a college, except by way of a tax on its tangible property. Our view is, that the language, "All public colleges," is meaningless, and that the legislative intent is found in and covered by the language in classes 2 and 3, which deal with the lands and buildings of public colleges, and nothing else is intended by that part of the section.

Before construing the language of the statute, it may be premised that the plaintiff is a public college within the meaning of the first subdivision of the section. And further, that it is an institution of purely public charity within the sixth subdivision. *Gerke v. Purcell*, 25 Ohio St. 229; *Cleveland Library Assn. v. Pelton*, 36 Ohio St. 253; *Little v. Seminary*, 72 Ohio St. 417 [74 N. E. Rep. 193.]

We do not consider it a matter of importance, however, whether the question of exemption of the plaintiff's property arises under the first or sixth subdivision of the statute for it is determined by the use to which the property is applied.

"The use to which the property is devoted determines its right to

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exemption, under any clause of the section." *Watterson v. Halliday*, 77 Ohio St. 150 [82 N. E. Rep. 962], opinion.

"All buildings connected with the same" (i. e., public colleges) are exempt. Connected how, or in what manner? Not physically, certainly. It would be a reflection on one's intelligence to assume that he would claim it meant physical connection of the building with the land used for the college purposes; not to speak of the impossibility of a physical connection of a building with an incorporeal thing or person created by fiction of law, and existing only in idea. The connection, then, of the building with the college, must be one of use. It might be expressed in this form, "All buildings belonging to a college and used by it for educational purposes are exempt."

The same construction should be placed on the clause following: "All lands connected with public institutions of learning." The connection must be in use, and the use must be of an educational character; that is, one that enables the college to better carry on the work for which it is created.

The educational use to which the property is applied must be exclusive. The property must not be used in whole or in part for profit. "Not used with a view to profit," applies to both buildings and land, and the cases sustain the construction that the property is not exempt unless the property is used exclusively for educational purposes.

In *Cleveland Library Assn. v. Pelton*, 36 Ohio St. 253, the court, speaking on this subject say, at page 259:

"The argument is, that as the word *exclusively* is omitted in the act of 1864, it was intended to change the law as construed in *Cincinnati College v. State*, and that now, if part only of the building is so used, and the residue is rented, the whole is exempt. This construction would defeat the limitation found in the words 'not leased or otherwise used with a view to profit.'"

In *Watterson v. Halliday*, *supra*, the court say, at page 173:

"And in this connection it is well to note the frequency of the use of the word *exclusively* in the several clauses of Sec. 2732, *supra*. It was evidently intended that such word should be given special consideration when the right to exemption of property is presented for decision, and its frequent use by the legislature, we think, is significant."

The same construction was placed on the part of the section under consideration by the circuit court of Cuyahoga county in *Meyers v. Akins*, 4 Circ. Dec. 425, 427 (8 R. 228).

"The language in the section preceding that quoted shows conclusively that all that is necessary to exempt the property is, that it shall be used exclusively for the purposes named."

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Keeping in mind the foregoing rules of construction, we come now to a consideration of the facts of the case and their application of the different pieces of property claimed by the plaintiff to be exempt.

Tract No. 1 (as described in the petition) known as Dr. Pierce's residence, tract No. 2, called Park Cottage, tract No. 3, known as Professor Benson's Cottage, tract No. 4, known as Sunset Cottage, tract No. 5, known as Prof. Hitchcock's residence, tract No. 9, consisting of three acres, on which are two dwellings, known as Dr. Jones' house and Prof. West's residence; tract No. 10 known as Dr. Davies' residence, tract No. 11 of one-half acre known as the Foote property; tract No. 12 called the janitor's residence; tract No. 13 known as Prof. Newhall's residence, and tract No. 1 on page 6 of petition known as the residence of Mr. Rust, may be all classed together. The evidence shows that they are residence properties, occupied for years and still occupied as homes or residences of professors of the college, but with one exception, the janitor's residence.

The properties are not used exclusively for educational purposes. They are, in a sense, rented or leased to their occupants.

Dr. Duvall, one of the professors and the treasurer of the college testifies:

"If we hadn't those (the residences) we would probably have to pay higher cash salaries. It is part of the professor's compensation, and if it was more advantageous to us to sell it and put the money out on interest and pay the professors a higher salary, we would probably do it. It is a question of making the best use of the property and keeping up the expenses of the institution."

The evidence is that no rental is paid in cash by any of the occupants. The professors are employed and paid a salary, and in addition a residence is furnished each if he has a family. It is understood by them when they are employed that in addition to their salary, they are to have a residence rent free; but, as Dr. Duvall says, the use of the residence may be regarded as part of their compensation.

Residence properties are no part of the institution of learning and are not necessary to its existence, and should be clearly distinguished from the college buildings used as libraries, recitation rooms, and in other ways as a part of the institution itself.

I have been much interested in the case of *Kendrick v. Farquhar*, 8 Ohio 189. It is particularly interesting because the same question was involved that we now have in the case before us in regard to the exemption from taxation of professors' residences of Kenyon College. The case went to the Supreme Court from this county, and it originated at Gambier more than seventy years ago. The plaintiff was a professor of Kenyon College. The defendant broke and entered the plaintiff's house to distrain for taxes due on the house. The plaintiff

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brought an action against the defendant for damages on the ground that the house was exempt from taxation, and the defendant was guilty of trespass in attempting to make the distraint. I commend to counsel's perusal and consideration the argument of that able lawyer of this bar, and counsel for the defendant in that case, Henry B. Curtis. The court adopted Mr. Curtis' view of the case, and while the statute at that time was different in some respects from our present statute, much that Mr. Curtis there said is equally as appropriate now.

Our conclusion is that the residence properties hereinbefore designated are not exempt from taxation.

To avoid carrying this opinion out to too great a length, we will state our conclusions in reference to some of the tracts or parcels of real estate, without giving any extended reasons therefor.

Tract No. 2, on page 7 of the petition, consisting of four acres of land, called the French property: This is now a vacant lot; the building was burned sometime ago; just when the evidence does not show. The property is not used in any manner by the plaintiff in connection with the college, and is not exempt.

Tract No. 7, in consecutive order as described in the petition, consisting of twenty acres of land adjoining the cemetery: This is a tract of unproductive woodland in nowise connected with the college, in the statutory sense of the term. In the case of each tract the burden is on the plaintiff to prove it is exempt from taxation. So far as the evidence shows this tract is held by the plaintiff for speculative purposes, with a view of prospective profit. It is properly taxed.

Tract No. 8, consists of ten or twelve acres of land used for pasture and agricultural purposes. It is rented by the college, and has been rented for cash or grain rent for a number of years. It is used with a view to immediate profit, and is taxable.

Tract No. 1 on page 7 of petition, called "Bishop's Backbone." This is a tract of land of 28.62 acres, part cleared and part woodland. It is not fit for agricultural purposes, but is used in part for pasturing stock. It belongs to the same class of property as the 20 acre tract, and is taxable.

Tract No. 14, page 6 of petition: This is a tract of one-half acre on which there is a pumping station, some wells, and a small house in which lives the employe of the plaintiff who has charge of the pumping station. It appears from the evidence that in 1902, the plaintiff constructed a water plant or system for furnishing water to the college buildings, the homes of the professors of the college, and perhaps other employes. In addition to that, water has been furnished a number of the citizens of the village who are in nowise connected with the college. The water plant was constructed and has since been main-

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tained, and a rental or water rate charged all the professors and other citizens whose residences are connected with the plant. The revenue derived from the sale of water amounts to about \$180 per year. The use of the one-half acre is a part of the compensation of the man who attends to the pumping station. The maintenance of a water system and sale of water cannot be said to be a part of the business of a public college; the land used for that purpose is diverted from college uses. It is, no doubt, a great convenience to the college and those who are fortunate enough to be its patrons as purchasers of water privileges; but lands devoted to uses that are convenient, are not, for that reason, exempt from taxation. This property is properly on the tax duplicate.

Tract No. 15, on page 6 of petition: This is a lot 65x130 feet on which is located the stand pipe of the plaintiff's water plant. It is a part of the system itself, and like tract No. 14, and for the same reasons, is taxable.

Tract No. 6, subdivision 1, page 3 of petition:

This is a tract of land of forty-five acres, near the village of Gambier, commonly known as the Military Academy Grounds. Taxes are charged on this tract for the years 1901 to 1907, both inclusive. Prior to 1900, the land and buildings thereon were used by the plaintiff as the seat of its preparatory department. In November, 1899, a contract was entered into between the plaintiff, of the one part, and Hills and Wyant, of the other part, by which Hills and Wyant were to take charge of and conduct a grammar school for three years, from July 1, 1900. The contract by its terms was renewable for two years longer, at the option of Hills and Wyant, expressed in writing six months before July 1, 1903. It appears, however, from the evidence, that the grounds and buildings were in possession of Wyant and Williams at the time of the destruction of the three main buildings, which were burned early in February, 1906, under the written contract with Hills and Wyant, a copy of which is in evidence, or another contract embodying the same provisions.

It is claimed by the defendant that the land and buildings were taxable for the years 1901 to 1905, inclusive, because of that contract, which is denominated a lease; that by leasing the property, it was used by the plaintiff with a view to profit, and, therefore, became taxable.

But was the contract really a lease? Or, what would probably be a more pertinent inquiry, was the property, by the contract, let or demised by the plaintiff with a view to profit? It stipulated for the payment by Wyant and Williams of \$2,000 yearly; but it was also agreed by the college that one-half of all the money received by its treasurer from students admitted into Kenyon College from the Grammar School, would be paid to Wyant and Williams, but not for

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more than two years after the admission of any such students; and the money so paid was to be expended in improvements, etc., on the property.

It was further stipulated that the Grammar School should be conducted as a preparatory school for Kenyon College; and that Wyant and Williams should "use their earnest efforts to obtain for said Grammar School the largest number of pupils that may be practicable, and will use their best endeavors and influence in every right and proper way to promote the welfare and prosperity of Kenyon College, preserve harmony and mutual friendship between the students of the college and Grammar School, and to secure of their pupils a preference for entering Kenyon College."

It provided further that the grade of instruction should be such as to fit the students for admission in the Freshman class of Kenyon College.

Taking the contract by its four corners and construing it, we are of the opinion that it was not a contract made with a view to profit on the part of the college, but was an agreement by which Wyant and Williams assumed the responsibility of the management and control of the preparatory department of the college, and its financial responsibilities. The "view to profit," if any, was on the other side of the contract. But whether Wyant and Williams did actually profit by the plan, we are not informed, nor is it material. By the contract the college did not relinquish all control of its preparatory department, but by its terms bound the other parties to conduct the school for Kenyon College; and provided for an immediate forfeiture of the contract by a breach of any of its terms.

We find and hold, that the contract was not made on the part of the college with a view to financial profit, but rather with a view of promoting and furthering the interests of Kenyon College, as a public institution of learning. It follows from this that the property was not taxable for the years 1901 to 1905, inclusive.

After the buildings were burned the school was discontinued on that property, and it has not since been used for that purpose. Some of the land has been cultivated, and about sixteen acres, in all, has been used for agricultural purposes. The remainder is mostly woodland and has not been used for any educational purposes. The use of the land has been diverted from college purposes, and for the years 1906 and 1907 belongs in the same class of property as "Bishop's Backbone," and is subject to taxation for those years.

Tract 6, subdivision 2: The building called "Drill Hall." This was one of the buildings used by the Grammar School. Since the fire its use for school purposes has been abandoned. The only use to which it has

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been put is storage. Like the land it should not be taxed for the years 1901 to 1905, but is taxable for the years 1906 and 1907.

Tract 6, subdivision 3: The building called "Milnor Hall." What has been said in reference to subdivision 1, as of the time before the fire, applies to this building, and we find it was not taxable.

Tract 6, subdivision 4: The building called "Delano Hall." This building, like "Milnor Hall," and for the same reasons, was not taxable.

Tract 6, subdivision 5: The building called "North Annex." This building, like the preceding, was not taxable.

The west end of Inlot No. 25, known as the Brown property. This property has been used as a residence property; it was purchased by the plaintiff and added to the college campus. It was placed on the tax duplicate after it became a part of the campus. It is clearly exempt from taxation.

Let counsel prepare and file a journal entry in conformity with this opinion. It may show motions for a new trial filed and overruled, with exceptions. Bond for appeal \$200.

Let each party pay one-half of the costs.

CRIMINAL LAW—FORGERY—INDICTMENTS.

[Huron Common Pleas, March 15, 1909.]

STATE OF OHIO v. HENRY F. BAILEY.

ABSENCE OF APPROPRIATE AVERMENTS OF EXTRINSIC FACTS NECESSARY TO SHOW PAPER WRITING A RECEIPT, RENDERS INDICTMENT FOR FORGERY THEREOF DEFECTIVE.

The defendant was charged in an indictment with fraudulently altering the date on a receipt for money of the following tenor: "Deposited with The Huron County Banking Company by Childs & Hoyt, Norwalk, Ohio. 4-16-1904 by H. F. Bailey, Currency 145. W. C. Pratt." Held, that the writing unaided by extrinsic facts does not import a receipt for money, and the indictment containing no appropriate averments of extrinsic facts is bad.

[Syllabus approved by the court.]

D. J. Young, Pros. Atty., for the state.

C. P. Wickham and Sherman Culp, for defendant.

RICHARDS, J.

This case is No. 7422, but there are six others involving the same questions that are raised in this case by the motion to quash and they will all be considered and decided together.

The indictment in this case, omitting the formal parts, charges that: "Henry F. Bailey, on the first of October, 1905, did falsely

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forge and alter a certain receipt for money, which said false and forged receipt for money, is of the purport, effect and value following:

'Deposited with The Huron County Banking Company by Childs & Hoyt, Norwalk, Ohio, 4-16, 1904, by H. F. Bailey, currency, 145. W. C. Pratt,' by changing the date thereof, as follows, 4-16-1905, with intent then and there to defraud.'

There are two grounds in the motions upon which these indictments are assailed. First, the alleged instrument is charged in the indictment to be a "receipt," when the same is not *prima facie* a receipt, and no extrinsic facts nor innuendoes are alleged to show that the instrument would, if genuine, have the operation and effect of a receipt. And second, from the indictment it does not appear how the alteration of the instrument might tend to defraud.

In the opinion of the court, the motions to quash in these seven cases are well taken. The instrument is not a receipt, as ordinarily understood, and does not purport to be one. It is what, in common parlance, would be known as a deposit slip. I think the authorities are clear that, under the statutes of this state, where an instrument is of the character that this is, and not *prima facie*, what the indictment alleges it to be, that the extrinsic facts must be set forth showing that it would come within the statute,—come within the designation of a receipt.

As has been well argued in support of this motion to quash, the instrument set forth may well have been a mere statement or a mere memorandum. We may guess and might all guess alike, as to what "currency, 145" means; but I think that in the indictment, there ought to be some averment of the fact. There is nothing shown in this indictment as to what relation W. C. Pratt bears to The Huron County Banking Company, or whether he bears any relation to that company.

It does not appear to the court from anything contained in the indictment, precisely how anybody could be damaged or defrauded by the alteration of a date upon this instrument. The date is averred to have been 4-16-1904, and to have been altered to 4-16-1905, and it is alleged that this was done with intent then and there to defraud; it does not allege thereby to defraud, and I think it ought to appear upon the face of the indictment how some one might be defrauded, or would be defrauded by the alteration of the date on that paper. It ought to appear in the indictment that under the method of doing business with that bank by these parties under the circumstances, that this instrument was used as and for a receipt. I think that it does not, of itself, indicate that.

My attention has been called to a case, *Henry v. State*, 35 Ohio St. 128, that I think is entirely pertinent to this case, and holds that:

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"Where in an indictment for uttering a forged receipt, the instrument set out is not *prima facie* a receipt, such extrinsic facts must be averred as are necessary to show that the instrument would, if genuine, have the operation and effect of a receipt."

On the same point, I cite also, *Carberry v. State*, 11 Ohio St. 410; *Bynam v. State*, 17 Ohio St. 142; *Moore v. State*, 7 Circ. Dec. 70, 72 (13 R. 10, 14).

It is argued, however, in behalf of the state, that the indictment may be helped by virtue of the curative language contained in Secs. 7215, 7218 and 7220 Rev. Stat. But those statutes cannot be broad enough to dispense with the making of the allegations now under consideration. The indictment ought to be clear enough so that it can be plainly and manifestly read, to charge an offense. It must still contain a charge of some offense in order to be a valid indictment under the law, notwithstanding those curative statutes to which I have referred.

As stated by Lord Mansfield in 1761, in 2 Burr 1127:

"In a criminal charge, there is no latitude of intention to include anything more than is charged; the charge must be explicit enough to support itself."

That language is cited and approved in *Redmond v. State*, 35 Ohio St. 82, 83. The decisions to which I have referred, *Henry v. State*, *supra*; *Redmond v. State*, *supra*, and *Bynam v. State*, *supra*, were, of course, rendered since the adoption of the curative sections to which I have called attention and yet in those cases, the statute referred to was not held to be broad enough to dispense with the averments under consideration. It seems to me therefore that the court can do nothing other than to grant the motions to quash these indictments. However, I think there ought to be in one of them a bond required of the defendant for his appearance at the next term of court, before the grand jury. A bond of \$500 will be required in any one of the cases which the prosecuting attorney may select.

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EMBEZZLEMENT—LIMITATION OF ACTIONS.

[Huron Common Pleas, March 15, 1909.]

STATE OF OHIO V. HENRY F. BAILEY.

ACT 97 O. L. 67 HELD NOT A STATUTE OF LIMITATION BARRING PROSECUTION FOR EMBEZZLEMENT OF SUM OF \$35 OR MORE AT ONE TIME.

A prosecution for embezzling at one time, a sum equal to, or greater than \$35, is not limited by Sec. 6842 Rev. Stat., as amended 97 O. L. 67, to three years from the time the offense was committed.

[Syllabus approved by the court.]

D. J. Young, Pros. Atty., for the state.

C. P. Wickham and Sherman Culp, for defendant.

RICHARDS, J.

The indictment in this case is in the usual form for embezzlement and charges the amount of the embezzlement to have been \$1,590, that it was embezzled at one time, and that the offense was committed the first of October, 1905.

The indictment is assailed by a motion to quash on the ground that it charges the claimed embezzlement to have occurred on October 1, 1905, while the indictment was returned in this court on February 24, 1909, more than three years after the time of the alleged offense; so that the motion to quash in this case raises the question of the construction to be placed by the court upon Sec. 6842 Rev. Stat. as amended in 97 O. L. 67.

From time immemorial until the adoption of this statute, in 1904, the section of the statute punishing embezzlement provided that a party should be punished as for the larceny of the thing embezzled. This amendment omitted these words from the concluding part of the earlier statute, and instead, added certain other words.

The preliminary part of the statute is, so far as this offense is concerned, substantially in the form that it has been for many years, reciting in detail those acts which may constitute embezzlement and providing that whoever commits those acts is guilty of embezzlement. Then comes this language:

“And if the total value of the property embezzled in the same continuous employment or term of office, whether embezzled at one time or at different times, if within three years prior to the inception of the prosecution amounts to or exceeds thirty-five dollars, shall be imprisoned in the penitentiary not more than ten years nor less than one year, or, if such total value is less than thirty-five dollars, be fined not more than two hundred dollars, or imprisoned not more than thirty days or both.”

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It is urged that under this amendment the language, fairly and reasonably construed, means that there can be no punishment for embezzlement unless it shall have been committed within three years prior to the returning of an indictment, that is to say, that this section fixes the limitation of a prosecution for embezzlement, whether it be a misdemeanor or a felony.

It is difficult to construe the English language as it has been used in the closing part of this section. If we can look only to the language contained in the section, apparently there would be no authority for punishing embezzlement, unless the prosecution were within three years. However, I think the court must look to the objects sought to be accomplished in making this amendment, and it must look to other statutes that might shed light upon the interpretation that ought to be given to this language. To the mind of the court, the purpose of this statute was to remedy a defect that had been discovered in the embezzlement statute, by which an agent, servant, clerk, etc., during a continuous employment, may have embezzled trifling sums from his employer at various times, and although the sum total might exceed \$35, yet the punishment would only be for that of a misdemeanor, because at no one time did he embezzle \$35. That, I think, was the amendment that the legislature sought to insert into this statute, authorizing the grouping of various sums, if embezzled within three years, so that if the total under one continuous employment amounted to \$35, it would be a felony, although the sums were embezzled at various times. That is what they sought to accomplish, and the purpose of introducing the words "three years" into the statute, manifestly was because that was the limitation of time for the prosecution of a misdemeanor, and it would be unjust, after the right to prosecute for a misdemeanor had become outlawed by the lapse of three years, thereafter to allow the money so taken to be added together with other money taken within three years or beyond three years, to make a total of \$35, and hence, allow a prosecution for felony, there being no limitation for felony.

That, I take it, was the purpose of inserting this three-year phrase into the statute. In ascertaining its meaning, the statute must be construed in connection with Sec. 6805 which reads:

"No person shall be indicted, or criminally prosecuted, for any offense, felonies excepted, the prosecution of which is not specially limited by law, unless such indictment be found, or such prosecution commenced, within three years from the time such offense was committed."

If Sec. 6842 Rev. Stat., which it is claimed reads that a prosecution to be maintained, must be brought within three years, means that,

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then it revolutionizes the policy of the state, for at least two generations.

Prosecutions for felonies, under the policy of the state, have been without limitation, and it would, by indirection, amount to a constructive repeal of the law which left felonies without limitation. So that, unless it is compulsory upon the court to say that this language must mean that the three-year limitation applies, the court would not and should not, adopt it.

The punishment prescribed for crime, in our statutes, and the period of limitation affixed for prosecution, are contained in different chapters, and in the chapter now under consideration, where the sections on embezzlement occur, the crimes are simply defined and the punishment prescribed. It is worthy of note that the offense charged in the indictment is of the character constituting a felony, whatever construction is placed upon the language in question, and that by Sec. 6805 Rev. Stat. the prosecution for felonies remains without limit of time.

The court is of the opinion that Sec. 6842 Rev. Stat. must be so construed as to amount to an authorization for adding together various embezzlements,—small sums, if within three years and under one continuous employment, so as to make a felony, and that it is not intended to amount to a statute of limitation for the punishment of an offense. It follows, therefore, that the motion to quash in this case, will be overruled.

APPEAL—GUARDIAN AND WARD.

[Franklin Common Pleas, February 1, 1909.]

GEORGE A. KRANER, AN IMBECILE, IN RE GUARDIANSHIP.

APPEAL LIES BY GUARDIAN TO ORDER TERMINATING RELATION.

An appeal may be taken by the guardian of an imbecile in the interest of the trust from an order of the probate court made upon application of the alleged imbecile himself, terminating the guardianship.

[Syllabus by the court.]

APPEAL from Franklin probate court.

Nathan Dawson and J. F. Hays, for George A. Kraner:

Cited and commented upon the following authorities: *Ebersole v. Schiller*, 50 Ohio St. 701 [35 N. E. Rep. 793]; *Browne v. Wallace*, 66 Ohio St. 57 [63 N. E. Rep. 588]; *Brigel v. Starbuck*, 34 Ohio St. 280; *Hiett v. Nebergall*, 45 Ohio St. 702 [17 N. E. Rep. 558].

J. C. Nicholson, for Chas. E. Kraner, Grdn.

Kraner, In re. .

KINKEAD, J.

This case comes into this court on appeal from an order made by the probate court terminating the guardianship.

The order was made upon application of the ward himself, after proper notice, to the guardian, and upon full hearing, the probate court finding that George A. Kraner was not an idiot, imbecile or lunatic, and that he was fully capable of taking care of and preserving his property.

The appeal from this order and judgment is taken by Charles E. Kraner, the guardian, the question presented for decision by this court being whether an appeal can be taken in such case, and therefore, whether this court has jurisdiction to entertain this appeal.

This question depends entirely upon whether an appeal in such a case is authorized under Sec. 6203 or 6407 Rev. Stat.

The proceedings were had under Sec. 6316 Rev. Stat., which empowers the probate judge to terminate the guardianship of an idiot, imbecile or lunatic, whenever the person of whom a guardian has been appointed, is restored to reason, or when the letters of guardianship have been improperly issued.

In the portion of the statutes relating exclusively to guardianship of imbeciles, idiots and lunatics, there is no special statute regulating appeals from orders and judgments made in respect to such matters, so that whether an appeal is justified in the present case must depend upon either Sec. 6203 or 6407.

There is a marked difference and purpose between these two provisions.

Section 6203 Rev. Stat. was originally a part of the act of April 17, 1857 (I. S. & C. 619) now comprising Secs. 6195-6203, which was an act furnishing a complete and adequate provision whereby next of kin recover their distributive shares of the estate, concurrent jurisdiction over such matters being conferred upon the common pleas and probate courts.

The act of April 17, 1857, of which the present Sec. 6203, was a constituent part pertained to two general topics or subjects, relating to the settlement of decedent's estates, viz.: 1. Enforcement of order of distribution. 2. Creation of power or authority upon executors, administrators, guardians or other trustees, to maintain a civil action in the court of common pleas against the creditors, legatees, distributees, or other parties, asking the direction or judgment of the court in any matter respecting the estate, etc., and the rights of the parties in interest as was formerly entertained in courts of chancery.

Section 6203 Rev. Stat., being a part of this act, undertook to provide for appeals from any final order, judgment or decree of the pro-

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bate court to the common pleas court, by any person against whom any such order or judgment may be made, "in the same manner as is provided for appeals from the probate court to the common pleas court in other cases."

This is conclusive evidence of a legislative purpose to provide for appeals in the class of cases coming within the act of April 17, 1857, in the matter of enforcement of orders of distribution.

The same act providing a mode of procedure for obtaining the direction and judgment of the court in any matter respecting the trust, estate or property, it necessarily had to be provided, as appears by the section, for appeals also to be allowed from any order or judgment of the common pleas to the court next higher than the common pleas, then the district court, now the circuit court, in proceedings relating to the enforcement of orders of distribution, etc., the common pleas court having concurrent jurisdiction in matters of enforcement of distribution provided in that act, and exclusive jurisdiction in proceedings asking the direction and judgment of the court in matters respecting the estate, etc.

The purpose of the act of April 17, 1857 (now Secs. 6195-6203; inc.), being explained, and comparing the same with Sec. 6407 Rev. Stat., it will be observed that the latter section is found among the general provisions pertaining to probate courts and the procedure therein, and that it was passed April 12, 1871, 68 O. L. 57, which provided for appeals to the common pleas in cases in addition to those specially provided for.

As Sec. 6203 Rev. Stat. specially provides for the cases as above shown, it seems entirely clear that it cannot apply to a final order or judgment made by the probate court by virtue of the power conferred by Sec. 6316, in proceedings for the termination of guardianship over idiots, imbeciles or lunatics.

Ebersole v. Schiller, 50 Ohio St. 701 [35 N. E. Rep. 793], is, by analogy, authority for such a conclusion, the appeal in that case being prosecuted from an order of the probate court refusing to remove an administrator. Guided by this decision in arriving at the purpose or construction of Sec. 6203, and construing it in connection with Secs. 6195-6203, inclusive, the conclusion is that the present case does not come within the provisions of Sec. 6203 Rev. Stat., although its language is general in its nature, and the section standing alone would justify this appeal.

Therefore, reliance must be had upon Sec. 6407 to justify this appeal.

This section, as it now stands, provides that appeals may be taken to the court of common pleas, from an order of the probate court re-

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moving or refusing to remove a guardian, "and in proceedings to appoint guardians for lunatics, idiots, * * * by any person against whom such order, decision, or decree shall be made, or who may be affected thereby."

Hiett v. Nebergall, 45 Ohio St. 702 [17 N. E. Rep. 558], is cited as an authority for the appeal in the case at bar, the question there being whether an appeal will lie from an order of a probate court overruling a motion of an imbecile ward to terminate the guardianship, upon the grounds that letters were in the first instance improperly issued, and that if he was an imbecile at the time the letters were issued he has since been fully restored to reason. The motion was made by the alleged imbecile himself to terminate the guardianship, which was overruled, and an appeal taken by him, which was sustained by the Supreme Court.

It is urged against the appeal here that there is a distinction between a proceeding under Sec. 6316 which is characterized as one to terminate the guardianship and one to remove a guardian where the guardianship continues. In the proceeding to terminate the guardianship over an imbecile, the sole question for determination is whether the ward was properly declared to be an imbecile at the time the appointment was made, or whether since the making of the appointment he has been restored to reason. The order of termination *ipso facto* disposes of the guardian, but it is not an order removing a guardian in the same sense that is an order made by the probate court removing a guardian of a minor ward. In the latter case the question is one of qualification of the guardian, while in the former it is one of the capacity of the ward.

The present proceeding is, therefore, not a proceeding of the character contemplated by the amendment of Sec. 6407, 95 O. L. 406, May 6, 1902, when it was provided that appeals may be taken "from an order removing or refusing to remove an executor, administrator, guardian." This amendment was made to provide for the remedy denied in *Ebersole v. Schiller*, *supra*.

When *Hiett v. Nebergall*, *supra*, was decided the above quoted provision authorizing appeals from orders of removals or of refusals to remove, was not in the section, so that that decision sustaining the appeal of the imbecile ward in that case was based upon that part of Sec. 6407 providing for appeals,

"In proceedings to appoint guardians * * * for lunatics, idiots, imbeciles, * * * by any person against whom such order, decision or decree shall be made, or who may be affected thereby."

In *Hiett v. Nebergall*, the order having been made against the alleged imbecile ward, he clearly had the right of appeal. This demon-

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strates that that decision does not furnish a precedent for the present case.

The guardian, as appears from the record, prosecutes the appeal in his fiduciary capacity, although he gives a bond which is not required of him by Sec. 6408 Rev. Stat. It is apparent from the record that the guardian is in fact a son of the imbecile and that there are other next of kin interested in the estate. For the purpose of determining the proper construction of the statute it may be supposed that a controversy may arise between parties interested in the estate; that the estate of the imbecile is about to be squandered, or that it is necessary to prosecute actions for the protection of rights of property. One set of contestants interested in the estate in a different way from another, may influence the alleged imbecile to ask to have the guardianship terminated, and the probate court may erroneously put an end to the guardianship. If no appeal can be taken by anyone interested in the estate or on behalf thereof, it might result in serious loss, affecting not only the ward's interests, but his heirs as well.

An erroneous judgment even upon application of the ward, terminating the guardianship, is an order against the guardian in his fiduciary capacity representing all parties in interest. A guardian in his fiduciary capacity is affected by the order of termination, and in the interest of the estate for the protection of the estate of the imbecile, as well as for those who may be dependent upon or interested in the estate, should have a right to appeal.

For these reasons the appeal is sustained and the motion to dismiss is overruled.

BANKRUPTCY—CORPORATIONS.

[Richland Common Pleas, January Term, 1907.]

B. F. LONG, TR., ETC. v. A. W. GUMP ET AL.

PROPERTY OF AN INSOLVENT CORPORATION FRAUDULENTLY CONVEYED BY ITS OFFICERS TO ANOTHER COMPANY MAY BE RECOVERED BY THE TRUSTEE IN BANKRUPTCY.

An action for recovery of the tangible property of a corporation, transferred by the officers thereof to another company of which they are the principal stockholders, and the good will of the business appropriated by them, is a chose in action which passes to a trustee in bankruptcy of the former company under act 70 of the bankruptcy act of 1898 (30 Stat. at L. 566) and an action will lie against such officers therefor.

[Syllabus approved by the court.]

Brucker & Cummins, for plaintiff.

Kerr & LaDow and B. F. King, for defendant.

Long v. Gump.

WICKHAM, J.

The petition in this case alleges that A. W. Gump, Henry A. Sheets and Frank L. Smith, who were officers and stockholders of the Sheets Printing & Manufacturing Company, of Shelby, Ohio, entered into a conspiracy to transfer to another corporation, for their benefit, a large amount of the tangible property belonging to the company; and also it is alleged that they organized a new corporation called the Sales Book Company, of which they were the principal stockholders, and caused the transfer of the property of the Sheets Printing & Manufacturing Company to the Sales Book Company, and caused to be appropriated to the Sales Book Company the good will and business of the Sheets Printing & Manufacturing Company, by reason of which it was damaged in the sum of \$20,000, for which judgment is prayed in the petition.

After the wrecking of the Sheets Printing & Manufacturing Company by these defendants, the company was adjudged a bankrupt, and this action is brought by Long, the trustee, to recover from the defendants this sum of \$20,000 for the benefit of the bankrupt and its creditors.

A demurrer is filed to this petition by A. W. Gump, and the cause is submitted to the court on that demurrer.

It is claimed for the demurrer that the cause of action set forth in the petition is not one which passed to the trustee in bankruptcy, and one of the grounds of the demurrer is, that the plaintiff has no legal capacity to sue; and, further, that the petition does not state facts sufficient to constitute a cause of action.

Is the right of action described in the petition one which passes to a trustee in bankruptcy?

Section 70, Subd. 5, 30 Stat. at L. 566, which describes property that passes to the trustee in bankruptcy, reads:

"Property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon or sold under judicial process against him."

And Subd. 6:

"Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Assuming the facts of the petition to be true for the purpose of the demurrer, the corporation had a right of action against the defendants for the tort committed by them in the appropriation of the company's property to the new company, and the loss sustained by the bankrupt company by reason of the things done by the defendants in carrying out their conspiracy, and could have maintained an action against them for damages.

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This right or chose in action is of that class which survives, and is therefore assignable. Section 4975 Rev. Stat. provides:

"In addition to the causes of action which survive at common law, causes of action for mesne profits, or for injuries to the person or property, or for deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same."

Being an action that would survive the death of a natural person, it would be assignable. *Cincinnati v. Hafer*, 49 Ohio St. 60 [30 N. E. Rep. 197].

Being a right of action for the injury to property that could be assigned, it would pass to the trustee in bankruptcy. *In re Burnstine*, 131 Fed. Rep. 828.

In the opinion of *In re Burnstine*, at page 831 the court say:

"The bankrupt, as next of kin, being entitled to the whole recovery, if had, there is no reason why he could not transfer his interest in the right of action, which, being assets for the purpose of founding administration, is therefore 'property' which 'he could have transferred.' "

Counsel for the demurrer cite authorities which hold that a right of action to enforce the statutory liability of stockholders does not pass to a trustee in bankruptcy, but we think that those cases are not analogous to the case at bar. The right of action to enforce the stockholders' liability belongs to the creditors and not to the corporation itself. As we have seen in the case at bar the chose in action is one which belonged to the bankrupt corporation. It is assets of the company, and, according to the facts of the petition, much the greater asset of the bankrupt.

Our conclusion is that the demurrer should be overruled, and exceptions noted.

Weis v. Weis.

PLEADING—RESCISSION—TENDER.

[Hamilton Common Pleas, March 3, 1909.]

JOHN WEIS V. EDWARD WEIS ET AL.

SUPPLEMENTAL PETITION AVERRING PERFORMANCE SUBSEQUENTLY NOT SUFFICIENT TO CURE FAILURE TO MAKE TENDER IN ACTION TO SET ASIDE FRAUDULENT CONTRACT.

A petition in an action to rescind an alleged fraudulent agreement must allege as a condition precedent, tender of the consideration received; it is not sufficient to aver that subsequently tender was made to put defendants in *statu quo*. Hence, a premature action is not curable by supplemental petition alleging subsequent accrual.

[Syllabus approved by the court.]

J. B. O'Donnell, for defendant.

Horstman & Horstman, for plaintiff.

GORMAN, J.

The amendment to the petition sets up that on February 24, 1909, the plaintiff tendered to the defendants \$2,250 in legal tender money and requested from defendants a reconveyance of an undivided one-fourth interest in certain real estate to plaintiff, and offered to restore the defendants in all respects in respect to said estate, etc., but that the defendants refused said tender and offer. Plaintiff therefore prays that said agreement be set aside, etc.

This amendment to the petition is to be taken and read in connection with the original petition and as a part thereof. In fact, it is a supplemental petition under Sec. 5119 Rev. Stat. setting up facts material to the case which occurred subsequently to the filing of the original petition. The original petition was filed on August 19, 1908, and the facts set up in the amendment to the petition occurred on February 24, 1909.

Judge Charles J. Hunt, of this court, on a demurrer to the original petition, held that if this is an action to rescind the alleged fraudulent agreement set up in the original petition, a refunder of the \$2,250 must first be tendered, inasmuch as plaintiff does not come within the exceptions referred to in *Manhattan Life Ins. Co. v. Burke*, 69 Ohio St. 294 [70 N. E. Rep. 74; 100 Am. St. 666]. In order to cure the averments of the original petition, plaintiff, after the demurrer to his original petition was sustained, avers that he made the tender on February 24, 1909, which was long after this action was commenced.

In order to maintain this action it is not sufficient for plaintiff to aver that subsequently to the bringing of the action he offered to put the defendants in *statu quo*. As a condition precedent to the right to maintain this action he must allege and prove that before the com-

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mencement of the action he made the tender. If he failed to make the tender before bringing the action he has no cause of action, because *non constat* if the tender were made before the action was begun, the defendants would have accepted the offer and rescinded, in which event the plaintiff would have no cause of action against the defendants. This seems to be the holding of the Supreme Court in the case of *Manhattan Life Ins. Co. v. Burke*, *supra*, as indicated by the following language of Judge Spear on page 302:

"In an action to rescind, the petition should allege the fact of such return or tender, prior to, or at least contemporaneous with, the commencement of the suit."

It would appear that the plaintiff brought his action prematurely; before he had offered to place the defendants in *statu quo*, and he now seeks by way of amendment to his petition to set up facts which have occurred subsequently to the commencement of the action to vitalize his original petition. But if these facts must have existed at the time the action was commenced in order to entitle the plaintiff to bring and maintain his action, it is difficult to understand how the tender can be made to have a retroactive effect so as to speak as of the time when the action was commenced.

A premature action is not curable by filing a supplemental petition showing subsequent accrual, for an action is supported by facts existing when it was begun. This fact of the tender did not exist at the time this action was begun. See in support of this proposition: *Morse v. Steele*, 132 Cal. 456 [64 Pac. Rep. 690]; *Lewis v. Fox*, 122 Cal. 244 [54 Pac. Rep. 823]; *Dickerman v. Railway*, 72 Conn. 271 [44 Atl. Rep. 228]; *Muller v. Earle*, 37 N. Y. Super. Ct. (5 J. & Sp.) 388; *Lowry v. Harris*, 12 Minn. 255; *Smith v. Smith*, 22 Kan. 487; *Wetmore v. Truslow*, 51 N. Y. 338.

For the reasons stated the demurrer to the amendment to the petition will be sustained.

Payne v. Stapely Co.

RECEIVERS.

[Hamilton Common Pleas, August, 1908.]

JOHN A. PAYNE v. GEORGE H. STAPELY CO.

1. "PROBABLY INSOLVENT" EQUIVALENT TO "IMMINENT DANGER OF BECOMING INSOLVENT."

"Probably insolvent," as descriptive of the condition of a corporation for which a receiver is asked, is as effective as "in imminent danger of becoming insolvent," the condition prescribed by Sec. 5587 Rev. Stat. Hence, an allegation that a defendant corporation is "probably insolvent," supplemented by other allegations of facts and conditions showing insolvency or "imminent danger of becoming insolvent," is sufficient to sustain an order appointing a receiver.

2. RECEIVERSHIP FOR PROTECTION OF SURETY FOR CORPORATION.

A court has jurisdiction under the rules of equity and in view of the provisions of Sec. 5539 Rev. Stat. to appoint a receiver for the protection of a surety for rent which has accrued and will accrue under a lease, who further alleges that he is a stockholder of the defendant company and also a large creditor and many attachment suits have been commenced against the company in various places and others are threatened.

[Syllabus approved by the court.]

Cohen & Mack, for plaintiff.

H. R. Probasco, for defendant, the Memphis Commission Company.

SWING, J.

The Memphis Commission Company, which has been made a party defendant in this case and which filed an answer and cross petition May 13, 1908, afterwards, on May 29, filed its motion and application to the court "to dissolve and hold for naught the order herein made appointing a receiver."

The principal grounds upon which this action is asked are substantially that the petition does not state facts sufficient under our statute and the usages of equity to warrant the appointment of a receiver or to give the court jurisdiction to appoint, and that no other facts than those alleged have been shown; and that the action is solely for the appointment of a receiver and not for any other relief to which the appointment is ancillary.

On June 3, 1908, an amended petition was filed by leave, making substantially the same allegations as in the original petition, but more full and complete, and in some respects more exactly in the language of the statute as to the appointment of receivers. The motion, being filed before the amended petition, was intended to apply to the original petition; but the whole matter was argued to me upon the pleadings as they stand.

The original petition alleges that plaintiff is a stockholder of the George H. Stapely Company, also a creditor to the amount of about

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\$10,000, and that "he is personally financially responsible as surety for certain obligations of the defendant company, to wit, for rent under certain leases of said defendant company," and it is shown that some of the rent was unpaid. He also alleges that "various suits have been brought against the defendant company in attachment and garnishment in various parts of the United States and Canada, and that the funds of the defendant company at various places have been tied up and placed beyond the control of the defendant company, and that other such suits are threatened, which will interfere with the conduct of the business of the company and make it impossible to carry it on properly;" that the company is "probably insolvent" and that plaintiff "is in jeopardy as surety upon the said obligations of the company" for rent; and various other things are alleged. The prayer is, that a receiver be appointed to take charge and dispose, under the orders of this court, of the assets of the corporation; to convert to the best advantage all of its assets into money; to pay and discharge its obligations and for such other relief as may be proper.

To the original petition the defendant company filed an answer, before the appointment of the receiver, in which it "admits all the allegations of the petition to be true, and joins in the prayer of the petition for the appointment of a receiver."

The defendant, the Memphis Commission Company, in its answer and cross petition, alleges that it is a creditor of the company and that "it is informed and believes" that the defendant company "is wholly insolvent and unable to pay its debts, and that if said corporation is not insolvent or unable to pay its debts, it is in imminent danger of insolvency, and owes a large amount of debts and claims which it is unable to pay;" but alleges that the petition of plaintiff does not set forth facts sufficient "to entitle him to the appointment of a receiver." The cross petition prays for the appointment of "a master to ascertain and report who the stockholders of said corporation are," what subscriptions if any to the capital stock are unpaid, what property and business the company has, and for all proper relief.

It complains among other things, by the motion to vacate the appointment, that the petition does not allege that the defendant company is either insolvent or in imminent danger of becoming insolvent, according to the terms of Sec. 5587 Rev. Stat. The petition does not use the language of the statute, but says as above set forth, that the company is "probably insolvent." It does, however, set forth facts and make allegations showing that the company is "in imminent danger of becoming insolvent." The facts alleged as to attachment suits in many places and the jeopardy in which plaintiff alleges he is placed as surety for the defendant company and all the allegations taken

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together are sufficient, if indeed there could be any question as to the sufficiency of an allegation of "probable insolvency." To say that the company is "probably insolvent" is quite as much as to say that it is "in imminent danger of becoming insolvent," and indeed is saying more. But, as stated above, the Memphis Commission Company, by its answer and cross petition, removes any question as to the facts, so far as the allegations in the pleadings are concerned, by alleging itself that the company is either "insolvent or in imminent danger of becoming insolvent."

Furthermore, it was shown upon the hearing of the motion to vacate the appointment, by the statements of the receiver in response to questions by counsel for the Memphis Commission Company, that the Stapely Company is in fact insolvent. His statement of the assets and liabilities that have come to his knowledge shows it to be badly insolvent.

But it is claimed by the Memphis Commission Company that the plaintiff does not set forth in his petition facts showing him to have such an interest as, under the law and the usages of equity, entitled him to ask for a receiver, does not state facts sufficient to give the court jurisdiction to appoint a receiver.

It is held in *Barbour v. Bank*, 45 Ohio St. 133 [12 N. E. Rep. 5], that a surety may have recourse to a court of chancery for its aid in protecting him, and a receiver may be appointed to preserve the property for his protection. The whole question of the jurisdiction of the court to appoint a receiver in such a case is discussed and decided by the court in that case, the court saying, page 141: "Our conclusion is, however, that the appointment was authorized and valid." Indeed, not taking time to quote the opinion more fully or to refer to the authorities cited by the court in the opinion, it does not leave the question of jurisdiction in the Stapely case open to doubt. So there is here a case of an action by a person who is surety for rent under a lease, in addition to being a stockholder in and a large creditor of the company, and many attachment suits commenced in various places and others threatened, and the business cannot be carried on successfully under the circumstances, and the facts admitted by the Stapely Company, and afterward more fully alleged as to the insolvency and the attachments by the Memphis Commission Company, and the insolvency shown by proof in open court on the hearing of the motion to vacate.

It may be added, though not necessary, that our statute specifically provides for the appointment of a receiver on application of the plaintiff in an attachment case, Sec. 5539 Rev. Stat. The Stapely case is not a suit in attachment, but the company by its answer joins with the

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plaintiff in asking for a receiver, because numerous attachment suits have been commenced in various places.

In the case of *N. Y. Rubber Co. v. Belting Co.* 5 Circ. Dec. 286 (11 R. 618), it is held, as stated in the syllabus:

“Where, subject to a levy of attachment, the debtor corporation applies for and obtains a receiver to wind up its affairs, and the books of account taken in attachment are turned over to the receiver of the corporation, under an order to collect the accounts and bring the proceeds into court, the order is equivalent to appointing a receiver in the attachment case, and the attaching creditor may preserve his priority, and work out his rights through the receiver of the corporation.”

There are facts in the New York Rubber Company case not in the Stapely case that may be and probably are sufficient to distinguish it, and it may be that what was done in the Stapely case on application of the company was not equivalent to the appointing of a receiver in the attachment cases under Sec. 5539 Rev. Stat.; but it is clear enough from that section and the Rubber Company case that the existence of an attachment suit or suits is a most important consideration in the exercise of the discretion of the court in determining whether a receiver should be appointed or not.

Taking all the pleadings and admitted facts in this case into consideration, I think it clear that the court had the jurisdiction to appoint the receiver and that the appointment was properly made—“that the appointment was authorized and valid.”

BAILMENTS—LIENS.

[Licking Common Pleas, September Term, 1908.]

JOHN MOORE v. CHARLES WHITEHEAD.

TITLE OF PURCHASER OF HORSE AGAINST LIEN OF STABLE KEEPER.

Where a stable keeper parts with possession of a horse upon which he has a lien for keep, under Sec. 3212 Rev. Stat., the title of a purchaser of the horse for value and without notice is superior to the lien of the stable keeper.

[Syllabus approved by the court.]

J. R. Fitzgibbons, for plaintiff.

S. L. James, for defendant.

WICKHAM, J.

This is an action in replevin. The defendant filed an answer to the petition of the plaintiff, and the plaintiff filed a general demurrer to the answer. The case is submitted to the court on that demurrer.

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The facts as they appear from the answer are, in substance, as follows: The defendant in 1905 was the owner and proprietor of a boarding stable for horses in the city of Newark, Licking county, Ohio; that he boarded a horse for some person whose name does not appear in the answer, which owner was accustomed to drive his horse about the city and vicinity, after which it was returned to the defendant's boarding stable. This occurred very frequently, as is usual with persons who keep a horse and hire it boarded by a stable keeper.

The owner of the horse, in 1905, was indebted to the defendant for board and care of the horse. He went to the defendant's stable one day in June, 1905, as it was his custom to do, and told an employe that he wished to take a drive; defendant was not present, and the employe hitched the horse to the conveyance, and the owner drove it away. While out driving on that occasion he sold the horse to the plaintiff, who purchased it without knowledge that the owner was indebted to the defendant for board and keep of the horse; that is to say, he was a purchaser of the horse in good faith and for value, without any notice of any claim upon the horse by the defendant by way of lien or otherwise.

The defendant claimed a lien upon the horse for its board and keep under Sec. 3212 Rev. Stat. The horse was not returned to the defendant's stable on that day, and on a subsequent day he saw it standing upon a public street of the city of Newark, hitched to a post; he thereupon unhitched the horse and took it to his stable, claiming the right to its possession by virtue of a stable keeper's lien, and thereupon the plaintiff replevined the horse.

The demurrer raises the question whether at the time of the purchase of the horse by the plaintiff, he took it subject to the stable keeper's lien, or upon the other hand whether by voluntarily permitting the former owner to take his horse away from his stable and use it, the stable keeper lost the lien as between himself and the plaintiff, a purchaser for value without notice of the lien.

Counsel for defendant cite the case of *Seebaum v. Handy*, 46 Ohio St. 560 [22 N. E. Rep. 869], and say they rely upon that authority. The case cited by counsel is no authority. It and the case before us are entirely dissimilar in their facts. In that case Handy lived outside of the city of Cincinnati, and he frequently drove into the city and left his horse at a livery stable to be fed and cared for; he was a customer of the stable keeper's for a long time, and became indebted to him for horse feed and care to the amount of more than \$100. He was accustomed to get his horse and drive home in the evening of every day, or nearly every day his horse was boarded at the stable. Mr. Handy was accidentally killed, and later the administrator of his estate drove

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the horse into the city and put it into another stable, whereupon a creditor of Handy, the plaintiff Seebaum, replevined the horse.

Our Supreme Court in that case held that Seebaum had no lien on the horse for its keep; that his case was not within the provisions of Sec. 3212 Rev. Stat. The court expressly say, at pages 568, 569:

“What should be the rule in cases where the animal is placed by the owner with a person to be fed and cared for, not temporarily—the horse being ordinarily kept at home or somewhere else by the owner—but, permanently for some time either definite or indefinite, presents a different question.”

The case mentioned by the Supreme Court is our case, and presents, as the court say, an entirely different question from the one before the court in the case cited, and the court say they express no opinion; the language is:

“In such case where the owner is allowed to use it, its voluntary delivery to him for such purposes might be said to imply a contract to return the animal, and a failure to do so would be such a fraud as to estop the owner from setting up that the lien had been lost by such voluntary delivery. But this is not the case before us, and we express no definite opinion upon it at this time.”

I find no case in point that sustains the claim of counsel for defendant, that a stable keeper's lien is paramount to the title of the purchaser, except one case which I will call attention to later. I find authorities which hold that the stable keeper's lien is not lost, as between him and the owner of the horse, by permitting the owner to take the horse out of his possession for use in the usual way, *Young v. Kimball*, 23 Pa. St. 193; nor between the stable keeper and an attaching creditor. *Welch v. Barnes*, 65 N. W. Rep. 675, 676 [5 N. D. 277].

In the case last cited the court go out of their way to hold that the lien is not lost as between the stable keeper and a purchaser for value without notice of the lien, and this case would be an authority in point were not the expression a mere *dictum*. They say:

“This being so the statute could not have intended to allow the owner to destroy the lien of the stable keeper, while having the possession of the horse on the street during the day by selling or mortgaging it to a stranger without notice of the lien. On the contrary, we are of opinion that every person is bound so far to take notice of the statute that, when he is about to become the purchaser or mortgagee of a horse found upon the street in the custody of its owner, it is incumbent upon him to make inquiry as to the place where the horse is boarded, and whether anything is due for its keeping. There is no greater hardship in this rule than there is in the general rule in respect of pur-

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chasers of personal property,—that the purchaser gets no better title than the seller has.”

As against this *dictum*, if it is to be regarded as any authority, we cite the case of *Marseilles Mfg. Co. v. Morgan*, 12 Neb. 66 [10 N. W. Rep. 462], where it was held that C, the owner of the horses, having executed a mortgage to the Marseilles Mfg. Co., the mortgagee’s title to the property was superior to that of Morgan, who claimed a lien for their feed and keep.

Another authority in point is the case of *Vinal v. Spofford*, 139 Mass. 126 [29 N. E. Rep. 288]; the second paragraph of the syllabus reads:

“Where a horse kept at a livery stable is used daily by the owner in his business, and is sold by him without the knowledge of the stable keeper and delivered to the purchaser, the stable keeper loses his lien for his bill, and cannot regain it by seizing the horse.”

This case is directly in point, and in our judgment is better authority than the case of *Welch v. Barnes*, *supra*. The reasons given by the Dakota court do not seem to us to be sound. It places too great a hardship upon the purchaser of the horse. We think it is the policy of the law not to restrict the alienation of property. A purchaser of a horse ought not to be required to buy at his peril, nor ought he to be put upon inquiry to inquire of every feed stable keeper, farrier, or others, whether they have liens upon a horse offered for sale. If one of two persons must suffer loss, it should be he who voluntarily puts it into the power of the owner of the horse to create the loss, and where a lienholder voluntarily parts with possession and the owner sells, the stable keeper should lose his lien rather than an innocent purchaser without notice be required to pay the amount of the seller’s debt before he acquires a good title.

Possession of chattel property is in one sense evidence of ownership, and a purchaser has the right to presume, as against another who claims a lien, that the seller in possession is the owner and can convey a good title. Whatever the rule may be as between the stable keeper and the owner, or between the stable keeper and an attaching creditor, our commission is that as between the stable keeper and a purchaser for value without notice of the claimed lien, the purchaser has the prior right.

Entertaining this view, our judgment is that the demurrer should be sustained.

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INJUNCTION—TRADE SECRETS.

[Hamilton Common Pleas, March 12, 1909.]

HOME STEAM LAUNDRY CO. v. THOMAS S. SMITH ET AL.

INJUNCTION DOES NOT LIE TO RESTRAIN FORMER EMPLOYE OF LAUNDRY FROM SOLICITING ITS CUSTOMERS FOR TRADE FOR HIMSELF.

Injunction will not lie against one, formerly employed as a route man by a laundry company upon quitting its service after having received notice of his discharge, to prevent his soliciting trade on a certain route thereof; it not appearing that he solicited such business while in its employ, that knowledge of the route could be obtained only by reason of such employment, that he agreed not to disclose or make use of any knowledge obtained in the employment. Nor will the fact that he obtained possession of the route prior to his notice of discharge and the allegation that the list could not later be found, in the absence of a preponderance of evidence that he took the list prejudice his rights to solicit such business.

[Syllabus approved by the court.]

Edward Ritchie, for plaintiff.

Edwin W. Kemper and R. M. Ochiltree, for defendants:

Cited and commented upon the following authorities: *Jones v. Shields*, 14 Ohio 359; *Spangler v. Cleveland*, 43 Ohio St. 526 [3 N. E. Rep. 365]; *Falls Vil. Water Power Co. v. Tibbetts*, 31 Conn. 165; *Hovelman v. Railway*, 79 Mo. 632; *Goodall v. Crofton*, 33 Ohio St. 271 [31 Am. Rep. 535]; *Story*, Equity Secs. 925-927; *Webber v. Gage*, 39 N. H. 182; *Jordan v. Woodward*, 38 Me. 423; *Florence Sewing Mach. Co. v. Manufacturing Co.* 8 Blatchf. 113 [9 Fed. Cas. 303]; *Shackle v. Baker*, 14 Ves. 468; *Lange v. Werk*, 2 Ohio St. 519; *Homer v. Graves*, 7 Bing. 743; *Wiswell v. Church*, 14 Ohio St. 32; *Wellman v. Harker*, 3 Or. 253; *Robbins v. Preble Co. (Comrs.)* 1 Circ. Dec. 340 (2 R. 23); *Fellows v. Walker*, 6 O. F. D. 362 [39 Fed. Rep. 651]; *Walker v. Railway*, 8 Ohio 38; *Putnam v. Valentine*, 5 Ohio 187; *Burnham v. Kempton*, 44 N. H. 78.

GORMAN, J.

This is an action to enjoin the defendants from using information claimed to have been a secret of plaintiff's business, and knowledge whereof was obtained by defendants while in the employ of plaintiff, to wit: knowledge of the names and addresses of customers of plaintiff who on certain days and at certain hours of said days were accustomed to give their laundry work to employes of plaintiff, and on certain other days and at certain hours of said days were accustomed to receive their clean laundry work from plaintiff.

It is claimed that both defendants conspired together to quit the employ of plaintiff on the same day, February 27, 1909, and did leave plaintiff's employ on said day, and that on Monday, March 1, 1909, in pursuance of said conspiracy, commenced to solicit laundry work from

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plaintiff's customers along what is known as route number five, using knowledge which they acquired while in the employ of plaintiff in a confidential capacity, and by misrepresenting to plaintiff's customers the truth, secured and are securing a large amount of laundry work from plaintiff's customers along route number five. It is averred that Smith was what is known as the route man and had charge of the lists of plaintiff's customers and their addresses, the route to be followed to reach each customer by the driver in the shortest time; that these lists are of great value to plaintiff and constitute its good will in the laundry business, and that the knowledge contained in these lists which were under the care of defendant, Smith, is a trade secret.

The case is submitted on the petition and answer of defendants, and on the evidence and arguments of counsel. At the close of the evidence it was admitted by counsel for plaintiff that no case had been made out against the defendant Harry Drake, and with this admission all allegations with reference to a conspiracy between the defendants falls to the ground. Drake was the man who drove the laundry wagon for plaintiff over the route claimed to have been affected. Smith went out occasionally and went over all the routes at different times for the purpose of observing and inspecting the work. Smith was under no written contract for any specified time and could be discharged at any time. There was no agreement between him and plaintiff to keep secret the matters relating to the routes, but the cards containing the names and addresses and days for calling of all customers upon the various routes were arranged in the best manner possible on an index card system, and kept under lock and key at the office of the plaintiff in the Arcade, in a cabinet, and no one had access to this cabinet or a key thereto except Smith, the president of the company, Mr. Klein, and the young lady in the office. Smith was informed by the president of the plaintiff company on Tuesday, February 23, 1909, that after two weeks his services would not be required any longer. On the same day Drake was told that his services would not be required after two weeks' time. There does not appear to have been any fault or complaint against either by plaintiff, but for some reason not disclosed their services were not needed by plaintiff. On Friday, February 26, 1909, both quit work without waiting for the expiration of the two weeks' time given them. Before Smith was notified that his services were to be dispensed with he took from the case all the cards making up route five, and says that he took them over to his desk at the laundry of plaintiff on Sycamore street for the purpose of checking up and correcting the list. On February 26, the day he quit, he testified that he put the cards into one of the drawers of his desk at the laundry on Sycamore street and gave the key of the card cabinet to Mr. Stuckenborg, the

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confidential man of the plaintiff company, and at the same time told Stuckenberg that the cards were in the drawer of the desk, and that the drawer of the desk was locked, and gave Stuckenberg the key to the desk drawer. Stuckenberg admits that Smith gave him both keys on this day at the time and place mentioned by Smith, but denies that Smith said anything about the cards containing the names of route five, and says that he has searched the drawers of the desk and that no cards are to be found. The young lady in the Arcade office says the cards are not in the cabinet and that she has not seen them since Mr. Smith took them away. On Friday after Smith left the employ of plaintiff, he went around to practically all the customers on route five and told them that on Monday, March 1, 1909, he intended to start in business for himself and solicited their patronage. He testified that these customers with a very few exceptions were old friends and customers of his personally; who had dealt with him before he was employed by plaintiff; that he had been in the laundry business for thirteen or fourteen years, and that these old customers were secured by him and brought to the plaintiff company from other laundries because of their friendship for him, and this evidence is undisputed. There were a few of the customers of the plaintiff secured by Smith whom he admits were not his old customers. He testified, and his testimony is uncontradicted, that he made no misrepresentation to any of plaintiff's customers to secure their patronage, but on the contrary, told them all that he had been discharged or had quit work for plaintiff and intended to go into the laundry business for himself, and that on account of their acquaintance with him for many years and his promise to do good work, they all promised and agreed to give him their work, and they did so.

The new driver of plaintiff who went over route number five on Monday, found that Smith had preceded him and had gotten practically all the work, although he did not see Smith, he did not learn of any misrepresentations made by him, but the customers all said they preferred to give the work to Smith. Smith has his own wagon and his own lists with his name printed thereon, and gets the work of his customers done at the Standard Laundry Company, conducted by Mr. Woest.

A temporary injunction was issued by this court on March 1, 1909, and Smith states, and his testimony is uncontradicted, that he has not since that time solicited any work from any of the customers on route five.

From the evidence in this case, the court is of the opinion that the prayer of the petition ought not to be granted. It is the policy of the law to allow as large and as unrestricted a competition in all branches of business as possible, to the end that the public may thereby be benefited and that no man or set of men should secure a monopoly in any

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business or any branch of business. It is contrary to public policy and good morals to foster or encourage monopolies or restrictions in trade. Unless the defendant Smith, by virtue of his employment learned something of the secret workings of plaintiff's business which he could not and would not have learned but for his said employment, and unless he either expressly or impliedly bound himself not to disclose or make use of these secrets, and unless he is now making use of those secrets which he could not have acquired except by virtue of his employment with plaintiff, and which he either expressly or impliedly bound himself not to divulge or make use of, then there is no foundation for the issuance of an injunction against him. This, as we understand it, is the rule laid down by the great weight of authorities and sanctioned by reason and a fair sense of justice. Let us examine this case in the light of this rule and see wherein the extraordinary process of injunction should be invoked and called into action to prevent the defendant Smith from soliciting whom he pleases, where he pleases and when he pleases, for laundry work.

In the first place the evidence that Smith made use of his knowledge of plaintiff's secret concerning the list of customers on route number five, acquired while in plaintiff's employ, does not support the contention of plaintiff. Plaintiff must establish by a preponderance of the evidence that Smith took and carried away the list of route number five, and made an improper use thereof to filch away its customers. Smith states positively that he did not take the list away but left it in his desk at the laundry on Sycamore street. Stuckenberg says Smith gave him the keys but said nothing of the cards of route number five, and he has not found them in the desk. Smith's testimony is to be given equal credence with Stuckenberg's, and the burden being on the plaintiff as to this matter, as well as every other averment necessary to make out its case, it fails on this point on the preponderance of the evidence. The fact that Smith took the cards from the Arcade office to the Sycamore street laundry before he was informed of his discharge does not indicate that he carried them away in face of the fact that he was not forbidden to take them over to the laundry, and his statement of why he took them over there. Again there is no evidence that Smith while in the employ of plaintiff, solicited any patronage for himself from any customers on route number five, but on the contrary his evidence is that he did not solicit until Friday, February 26, after he had left the employ of plaintiff.

Again the knowledge of the names and addresses of the customers on route number five and the times when they delivered and received their laundry was such a simple thing to learn that any person of ordinary intelligence could have acquired this knowledge by simply follow-

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ing plaintiff's wagon over the route, so that Smith could have learned all these facts if he had never been in the employ of plaintiff, and therefore, this case does not come within the rule laid down by Judge Hosea in *Seifried v. Maycox*, 14 Dec. 536, cited and relied upon by counsel for plaintiff.

There was no contract made by Smith whereby he agreed not to disclose or make use of any knowledge he might acquire of the secrets of the plaintiff's business, but it is contended and held to be true, that there is an implied contract on the part of all servants that they will not make use of any secrets they may have learned of the master's business while in his employ, which they could not have learned except for the employment. But in the case at bar as we have pointed out, Smith could easily have learned all about these routes without being in the employ of plaintiff, and he further says in his testimony that he did acquire his knowledge of the customers and their addresses and was a friend of theirs long before the plaintiff knew them or had secured them as customers.

The case of *Smith v. Kernan*, 8 Dec. Re. 32 (5 Bull. 145), decided by Judge Harmon, is quite different from the case at bar. In that case the plaintiff had a trade-mark on her bread; every loaf had stamped on it "Domestic" and this word had been used for years and become well known and famous throughout the city under this name. All of her employes quit work in a body in pursuance of a conspiracy to take away her entire trade, which was thereby ruined and paralyzed, and these employes headed by Kernan, who was the manager of her business and had an interest in the profits and was a *quasi* partner as found by the court, started a rival business, leaving the plaintiff without any employe whatever, and began to hold themselves out as making the same bread formerly made by plaintiff and used her trade-mark "Domestic." And the drivers who had been with plaintiff and knew all the customers, went over the routes selling the bread of the defendant to the old customers, under the name of plaintiff's bread. Besides, the case was decided on a demurrer, which for the purpose of the demurrer, admitted all the allegations of the petition to be true.

Nor does the rule laid down in *Pearl Laundry v. Wertz*, by Judge S. W. Smith of this court, apply to the case at bar, because in that case the defendant was employed to build up the route for plaintiff and was paid therefor, and while in the employ of plaintiff he solicited the patronage of the customers for himself and afterwards went over the route in the exact order as to time and place that he had formerly done for plaintiff and solicited and secured the business for a competitor of plaintiff. The evidence in the case at bar does not disclose such facts, and this court is not disposed to go beyond the rule laid down by Judge

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Smith in *Pearl Laundry v. Wertz*, *supra*, and is inclined to believe that on the facts as shown in that case, he would have decided differently from the learned judge who announced that decision.

For the reason stated the injunction will be denied and the petition dismissed at plaintiff's costs. The temporary restraining order will be vacated and dissolved.

COURTS—HABEAS CORPUS—PRISONS AND REFORMATORIES.

[Hamilton Common Pleas, January Term, 1908.]

IN RE CHARLES SCHOOLER.

COMMITMENT TO WORKHOUSE FOR MISDEMEANOR HELD VALID AS AGAINST HABEAS CORPUS.

A police court in a city having a workhouse has authority under Sec. 2107e (Lan. 3443; B. 1536-383) Rev. Stat., to commit to such workhouse on conviction for misdemeanor. Habeas corpus will not lie, in any event, because of mere error in committing accused to the workhouse instead of the county jail.

[Syllabus approved by the court.]

H. D. Burnett, for petitioner.

J. M. Thomas, Jr., contra.

WOODMANSEE, J.

This is a petition for a writ of habeas corpus. The petitioner, Charles Schooler, represents that he is illegally restrained and deprived of his liberty by being confined in the workhouse located in the city of Cincinnati, Hamilton county, Ohio.

It is admitted that Schooler pleaded guilty to the charge of "loitering" in the police court, Cincinnati, and was fined \$50 and costs, and thereupon was committed to the workhouse in said city until said fine and costs are paid.

Counsel for petitioner claims that the judge of the police court had no authority to commit said Schooler to the workhouse, and that said commitment and sentence are void and that he should therefore be discharged from custody by this court.

Counsel for the petitioner relies upon the recent decision of the Supreme Court of Ohio in the case of *Lemmon v. State*, 77 Ohio St. 427 [83 N. E. Rep. 608]. In that case Lemmon had been committed to the workhouse in the city of Toledo, and according to the opinion of the Supreme Court by virtue of Sec. 2099 (Lan. Rev. Stat. 3430; B. 1536-369).

This section provides that:

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"When a person over sixteen years of age is convicted of an offense, under the law of the state or an ordinance of a municipal corporation, and the tribunal before which the conviction is had is directed by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, shall sentence the offender to the workhouse, if there is such house in the county."

The Valentine law, under which Lemmon was sentenced, provides for a fine and imprisonment, but does not direct as to where the convicted party shall be imprisoned, and therefore the Supreme Court in construing the section herein referred to, states that the provision of Sec. 1536-369 does not apply because this latter section refers only to cases where the court is *directed* by law to commit.

I cannot understand why the Supreme Court in passing upon this case made no reference to Sec. 2107e (1) (Lan. Rev. Stat. 3443; B. 1536-383), which provides as follows:

"When a person has been convicted of a misdemeanor by any court or magistrate of this state in a district in which there is a workhouse, it shall be competent for such court or magistrate to sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the jail of the county allowed by statute for such offenses; and in all such cases the court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he be discharged as herein provided; and in all cases where a fine may be imposed in punishment in whole or in part for an offense and the court or magistrate could order that such person stand committed to the jail of the county until such fine and the costs of prosecution are paid, such court or magistrate may order that such person stand committed to such workhouse until such fine and costs are paid."

Our statutes define a misdemeanor to be any offense, the penalty of which is less than punishment in the penitentiary. This statute clearly gives to the court the authority to commit to the workhouse, and it is not limited in terms like Sec. 1536-369, which means only such cases as those where the court is directed by law to commit.

The Supreme Court having made no reference to this section which I have quoted, I am constrained to follow its plain terms unless otherwise directed, and in doing so, I find that the police court of Cincinnati was acting clearly within authority when it committed the petitioner to the workhouse located in Cincinnati.

The statute that was construed by the Supreme Court was passed May 7, 1869 (66 O. L. 195), and the statute under which I hold that the petitioner is properly committed in this case was passed March 29, 1883 (80 O. L. 83).

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I also find that Sec. 6801b makes like provisions for commitment of persons found guilty of misdemeanors in counties and municipalities having no workhouse, to sentence such persons to a workhouse in some other county or municipality after making proper arrangements therefor as set out in said statute. But independent of the construction which I have placed on the statutes referred to, I find that the writ asked for herein should be refused.

If the police court under the statute was without authority to commit to the workhouse, did that act in itself make the whole proceeding void and thereby place the necessity upon this court of discharging the petitioner?

I think the general rule is well established that if the court had jurisdiction and power to convict and sentence, the writ can not issue to correct mere error. *Parks, Ex parte*, 93 U. S. 18, 23 [23 L. Ed. 787].

In the case of *Graham, In re*, 74 Wis. 450 [43 N. W. Rep. 148; 17 Am. St. Rep. 174], the petitioners applied for writs of habeas corpus, claiming to have been sentenced respectively to imprisonment in the state prison for thirteen and fourteen years, when the act under which convictions were had permitted imprisonment for not more than ten years nor less than three years. The court said:

"We deny the writs for the reason that the error in the judgments does not render them void, nor the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of habeas corpus. The judgments are doubtless erroneous, and would be reversed on writ of error. * * * But the judgments are not void. * * * The court had jurisdiction of the persons and subject-matter, or offense, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by habeas corpus. The law is well settled in this court that on habeas corpus only jurisdictional defects are inquired into. The writ does not raise questions of errors in law, or irregularities in the proceedings."

In *Max, Ex parte*, 44 Cal. 579, Max petitioned to be discharged on habeas corpus, because he was sentenced as for conviction of a felony when he was convicted for a misdemeanor merely. His counsel contended the judgment was absolutely void and conferred no authority to the warden to detain the petitioner. The court say, page 581:

"We are of opinion, however, that the position cannot be maintained. The indictment upon which judgment is founded is sufficient in all respects; the offense of which the petitioner was convicted was one within the scope of the indictment, and the judgment one which the county court had the authority to render upon the appearance and plea of the petitioner. These conditions constitute jurisdiction; all others involve questions of mere error, and the latter cannot be inquired into upon writ of habeas corpus but only upon proceedings in error."

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In *People v. Kelly*, 97 N. Y. 212, an application was made for a writ of habeas corpus by a prisoner who had been convicted of an assault in the third degree and sentenced to imprisonment at hard labor in the state prison for a term of one year. The court of appeals held that the offense was a misdemeanor and punishable only by imprisonment for not more than one year or by a fine of not more than \$500, or by both. The case was one of an excessive sentence upon a valid conviction. But the court refused to discharge the petitioner, and remanded him to the sheriff in order that the trial court might deal with him according to law.

In *Bond, Ex parte*, 9 S. C. 80 [30 Am. Rep. 20], the petitioner had been convicted of assault with intent to kill and sentenced to confinement in the penitentiary at hard labor. The court held that the offense was not punishment by confinement in the state penitentiary, and that the sentence was therefore erroneous, but that it was not void, and refused to discharge the prisoner on habeas corpus. See, also, *Petty, In re*, 22 Kan. 477; *Phinney, In re*, 32 Me. 440; *Mooney, Ex parte*, 26 W. Va. 36 [53 Am. Rep. 59].

Bonner, In re, 151 U. S. 252 [14 Sup. Ct. Rep. 323; 38 L. Ed. 149], is a well considered case where the petitioner had been wrongfully confined in the penitentiary. The decree of the court was the discharge of the petitioner from the custody of the warden of the penitentiary, but without prejudice to a resentence. In that case it was claimed the sentence and order were void.

The decision in this case really modifies the strict rule set out by Justice Harlan in the case of *Mills, Ex parte*, 135 U. S. 263 [10 Sup. Ct. Rep. 762; 34 L. Ed. 107].

I heartily endorse the following words from the decision of the Supreme Court of Pennsylvania in the case of *Beale v. Commonwealth*, 25 Pa. St. 11:

"The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner who was guilty as established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence. If this court sanctioned such a rule it would fail to perform the chief duty for which it was established."

Coming now to Ohio cases, I quote from *Shaw, Ex parte*, 7 Ohio St. 81 [70 Am. Dec. 55]:

"A habeas corpus cannot be used as a summary process to review or revise errors or irregularities in the sentence of a court of competent jurisdiction. Imprisonment under a sentence cannot be unlawful, unless the sentence is an absolute nullity. If clearly unau-

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thorized and void, relief from imprisonment may be obtained by habeas corpus; if voidable a writ of error is the appropriate remedy."

The court go on to say, page 83:

"It is said to be the practice in some parts of this state to use the writs of habeas corpus as a short and summary mode of reviewing, as upon a writ of error, and annulling the sentences of court. If this be so, it is an abuse of the writ of habeas corpus which cannot be too soon corrected."

Van Hagen, Ex parte, 25 Ohio St. 426:

"Habeas corpus is not the proper mode of redress, where the relator has been convicted of a criminal offense, and sentenced to imprisonment therefor by a court of competent jurisdiction; if errors or irregularities have occurred in the proceedings or sentence, a writ of error is the proper remedy."

I find as heretofore stated that the petitioner was properly committed to the workhouse in Cincinnati. I further find that if a mistake was made such as claimed by counsel for the petitioner, in the sentence of the court, that the same should have been corrected by proceedings in error, and that habeas corpus is not the proper proceeding.

The writ is accordingly refused.

MOTIONS AND ORDERS—PARTIES.

[Hamilton Common Pleas, March 3, 1909.]

SARAH MORRIS AND JENNIE BROSE V. F. A. SCHMIDT.

MOTION TO SET ASIDE ENTRY SUBSTITUTING PERSONAL REPRESENTATIVE AS PARTY PLAINTIFF IN JOINT ACTION FOR MONEY REFUSED.

An entry, upon suggestion to the court of the death of one of the parties plaintiff to an action for money judgment and appointment of an administrator therefor, granting the application of the administrator to be substituted as a party as provided by Sec. 5149 Rev. Stat., is within the discretion of the court under Sec. 5012; Secs. 5150 to 5161, prescribing procedure for revivor of actions are not exclusive, hence, a motion to set aside the entry on the ground that no summons in revivor has been issued or served on defendant is properly refused.

[Syllabus approved by the court.]

MOTION to strike entry from files.

Closs & Luebbert, for plaintiffs.

Cormany & Cormany, for defendant

GORMAN, J.

The petition filed herein is on behalf of two plaintiffs claiming a money judgment against defendant; and the averments of the petition disclose that the action is joint, not joint and several.

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After the action was begun and the defendant had answered, one of the plaintiffs, Sarah Morris, died. Within one year from her death Richard Morris was appointed administrator of her estate, and made application to this court to be substituted as a party plaintiff in this action in place of Sarah Morris, deceased, suggesting the death of said Sarah Morris and his appointment as her administrator. This court made an entry granting said application or motion, on June 19, 1908, and made said Richard Morris administrator of Sarah Morris, a party plaintiff. This is the entry which the defendant now asks to be stricken from the files, (it should be a motion to set aside the entry) on the ground that no summons in revivor has been issued or served on defendant within one year from the death of said Sarah Morris, as provided in Sec. 5158 Rev. Stat.

This action is one that does not abate by the death of the parties. Section 5144 Rev. Stat.

The proceeding to bring in the administrator of one of the deceased plaintiffs as a substitute for the deceased party, is authorized by Sec. 5012 Rev. Stat.; and this may be done in the exercise of a sound discretion by the court, regardless of the provisions of Secs. 5146 to 5161 Rev. Stat., inclusive. These sections are not exclusive. See *Carter v. Jennings*, 24 Ohio St. 182; *Black v. Hill*, 29 Ohio St. 86.

The mode of revivor is pointed out in Sec. 5149 Rev. Stat., and "may be effected by the allowance by the court, or a judge thereof in vacation, of a motion of the representative or successor in interest to become a party to the action; or by supplemental pleading," etc., but the limitations contained in the subsequent sections of the chapter do not apply to this section. In the case at bar the revivor was effected in the manner provided by the first part of Sec. 5149, and in accordance with the power lodged in the court by Sec. 5012 Rev. Stat.

The limitations of Secs. 5150 to 5161 Rev. Stat. not applying to this method of procedure in revivor. No summons is necessary, nor is any notice necessary; nor is it necessary to have a conditional order of revivor as provided in Secs. 5150 to 5160 Rev. Stat.

The motion is therefore overruled.

Telephone Co. v. Parmenter.

DAMAGES—TELEGRAPHS AND TELEPHONES.

[Sandusky Common Pleas, December 23, 1908.]

CLYDE TELEPHONE CO. v. F. M. PARMENTER ET AL.

1. RELATIVE RIGHTS OF TELEPHONE LINES AND HOUSE MOVER IN STREETS.

Neither moving houses nor operating telephone lines in streets comes within the primary purpose thereof, that of travel, but each is an allowable use under proper restrictions and with due regard to the rights of others.

2. TELEPHONE WIRES NOT IMPROPERLY IN STREET, WITH MUNICIPAL CONSENT.

The location of telephone poles and wires in a street rests within the control of municipal authorities acting in good faith. Hence, in an action involving conflicting rights of a house mover and a telephone company, the former cannot contend that the location of the telephone line, on account of density of foliage and location of trees, is improper, when it is satisfactory to the municipal authorities.

3. HOUSE MOVER MUST BEAR EXPENSES TO TELEPHONE LINE BY REMOVAL OF HOUSE IN A STREET.

Expenses resulting from moving a house into and along a street on which is located a telephone line having a vested interest therein under a municipal franchise must be borne by the house mover.

4. EXPENSES TO TELEPHONE LINE IN STREET BY REMOVAL OF HOUSE HELD NOT WAIVED BY STATEMENT OF MANAGER TO GO AHEAD AND START THE BUILDING.

A telephone company having installed a line of poles and wires in a street under municipal authority does not, by a statement of its manager to a house mover, that its wires would be taken care of to the extent of going ahead and starting the house, waive the right to exact cost of removal of its poles and wires from moving house along such street, or assume expense of altering the house to evade injuries to its property, when it does not appear that he had any knowledge that the removal would interfere with its line, especially if after observing the danger threatened, he refused to stand for such prospective expenses.

[Syllabus approved by the court.]

INJUNCTION and hearing upon merits.

Homer Metzgar, for plaintiff.

D. A. Heffner, for defendant.

RICHARDS, J.

This case is an injunction suit involving a controversy arising from the location of the plaintiff's wires, poles and cross-arms on certain streets in the village of Clyde, and the removal of a house belonging to the defendant through those same streets. The plaintiff brought the action for the purpose of preventing the defendant from interfering with its telephone poles, wires, cables, etc., in the removal of this house. The plaintiff operates a general telephone business in the village of Clyde and vicinity.

The defendant began the removal of the house, and had gotten the house out from the lot onto Buckeye street, and was moving it northeast

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when it came into collision with, and broke, a pole and cross-arm belonging to the plaintiff company, and disarranged some of the plaintiff's wires, and thereupon this injunction suit was brought.

The case came up in this court upon a motion to dissolve the injunction, and as a result of that hearing the injunction was so modified as to order the defendant to cut off a section of the gable of his house sufficiently to allow its removal in the streets, and requiring the plaintiff to put in the hands of the clerk of this court an amount of money reasonably sufficient to pay that expense; the court reserving the right thereafter to determine who ought to stand the expense.

After the modification of the injunction, the defendant altered the house so that it might be removed along the streets, and it was removed and placed in the location desired by the defendant, and this case comes on for hearing upon the merits, to determine who ought to stand this expense, and pay the costs of the action.

Sections 3454 to 3471-8 Rev. Stat. give certain rights to telephone companies for the construction of lines of poles in the streets of municipalities, and upon the highways, with the provision that they shall not be so built as to incommode the public. The plaintiff company, in addition to this statutory right had a franchise in the village of Clyde, providing for the specific location of its lines within the municipality.

The general statutory rights are discussed in the case of *Farmer v. Telephone Co.* 72 Ohio St. 526 [74 N. E. Rep. 1078].

The primary use of the streets, of course, is for the purposes of travel, and in the judgment of this court, neither the moving of a house nor the operation of a telephone line is an original or primary purpose of the street. Neither one of them subserves the purposes of travel, but each of them is an allowable use of the street, providing it is used under proper restrictions, and with due regard to the rights of others.

It has been held that the use of a street by an electric railroad is a primary use of the street, as it subserves the purposes of travel. See *Cincinnati Inc. Pl. Ry. v. Telegraph Assn.*, 48 Ohio St. 390 [27 N. E. Rep. 890; 12 L. R. A. 534; 29 Am. St. Rep. 559].

That case also decides that it could not be held that a telephone company, the business of which is to transmit intelligence, is using the streets for the purpose of travel,—the primary use to which the streets are dedicated.

Nevertheless, the telephone company, by obtaining a location, and accepting it, and constructing its line upon the location granted, does acquire property rights, provided it does not violate the statute which says it must not incommode the public. I think that expression means, incommode the public in the use of the streets for the purposes to which streets are usually devoted. See *Northwestern Tel. Exch. Co. v. An-*

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der son, 12 N. Dak. 585 [98 N. W. Rep. 706; 65 L. R. A. 771; 102 Am. St. Rep. 580].

This is a case which has been found important enough to be reported in the two series of collected reports cited.

The court say in the syllabus, reading now from the 102 Am. St. Rep., at page 580:

"The acceptance of the terms and conditions of an ordinance granting to a telephone company the use of the streets of a city constitutes a contract between the company and the city, and the construction of its line at large expense gives such company vested rights which the city cannot impair by granting to persons the use of such streets for private purposes or extraordinary uses.

"House moving in a street is an extraordinary use thereof, and while it may be permitted, it cannot be allowed so as to destroy the use of the street for the purpose of travel or other necessary public purpose, or to destroy or impair vested rights.

"A licensed house mover in a city is liable for an injury done by him, while moving a house, to the wires and property of a telephone company authorized by ordinance to establish and maintain a telephone line and system in the streets of such city."

This case reviews the decisions pretty fully up to the time of its decision, and is a comparatively recent case, being only some four years of age, and it contains a very thorough consideration of the questions involved.

Another case, more recent yet, is the case of *Kibbie Tel. Co. v. Landphere*, 151 Mich. 309 [115 N. W. Rep. 244], a decision of March 5, 1908.

The Compiled Laws of Michigan, Sec. 6691, provide that every telephone company organized thereunder shall have the power to construct and maintain lines for the transmission of telephone messages through the public streets and highways with all necessary erections and fixtures therefor, provided that the same shall not injuriously interfere with other public uses of said places. Held, that the use of the streets for moving a building was an unusual and extraordinary use, and was not such "other public use" as was contemplated by the statute. Where the telephone company, under the powers conferred upon it by the statute under which it was organized, erects its poles, wires, cables, etc., in a proper manner in the streets and highways, it has a vested right to their use and maintenance, and interference with them or destruction of them would be an appropriation of property without due process of law, which should be restrained.

Our own circuit court has had occasion to pass on a question somewhat similar, being a case of the removal of a structure across an

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electric road. See *Toledo, B. G. & So. Trac. Co. v. Sterling*, 29 O. C. C. 227 (9 N. S. 200); see also, *Williams v. Railway*, 130 Ind. 71 [29 N. E. Rep. 408; 15 L. R. A. 64; 30 Am. St. Rep. 201].

Such, then, are the general rights of a telephone company located in and along the streets, and of a house mover. Are there any facts in this case that would amount to a waiver, or estoppel, on the part of the plaintiff? It has been urged, on the part of the defendant, that in a conversation had between the defendant and the manager of the plaintiff company, the company waived any right it had, and should be prevented from exacting from the defendant the cost of the removal of the poles and lines, or for the alteration of the house.

It was found by the court that the cutting off of some four feet of gable would be cheaper than changing the pole lines. The number of lines and poles interfered with was so great that the evidence showed it would be less expensive to alter the house, and that was the sole reason for cutting the house, instead of changing the poles and arms.

The defendant in this case had obtained from the mayor of the village of Clyde a written permit for the removal of this house, and had interviewed the manager of the plaintiff company with regard to the removal before the beginning of the undertaking, and they both agree that it was said by Mr. Fuller, the manager, that the wires would be taken care of to the extent that he might go ahead and start. To that extent they agree. The manager of the company denies any agreement that he would take care of the poles and wires and cross-arms and provide for the removal of the house down Buckeye and Main and Duane streets.

It may be, if the evidence showed an agreement on the part of the company to take care of its poles, cross-arms, and cables, and the defendant had begun his moving, which he would not otherwise have done, that the plaintiff would be estopped; but there is no evidence in this case that the plaintiff, at the time of this conversation had any knowledge that the removal of the house would interfere with the line of poles and arms along the street.

While Mr. Fuller resides on the same street that this house was on, yet he naturally did not observe the precise width of it; neither did he know the precise distance between the poles. In fact it is very doubtful whether the defendant himself believed, until he got his house on the street, that so many poles would be interfered with.

The company of course knew that to get this house upon the street would require the removal or elevation of the cables and wires reaching along the street in front of the house, but the conversation occurred at the People's bank, and not upon the street where the pole line might have been examined and the distance observed and the size of the house

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measured or observed, and I am convinced from the evidence that it was not thought of at the time that there would be such a serious interference, if there would be any interference, with the poles themselves, or the pole arms, along a large part of Buckeye and Duane streets.

Shortly after this conversation, the parties again met at the location of the house. At that time the house had been raised from the foundations, and while the evidence is not very clear on that, I think it had been moved off from part of the foundation. Just how far it had been moved is not clear; but it had at least been placed on trucks and moved part way to the street, and then it was apparent to the manager of the plaintiff company that to move the house along the streets would seriously interfere with many of the poles and arms and cables, and then the defendant was told by the manager of the company that the company would not stand the expense, and Mr. Parmenter said he didn't think he ought to stand for it, and a bond was talked of, no amount being stated, and the plaintiff company declined to make the change unless the defendant would secure the amount of expense, which the defendant declined to do.

Now, I think that suggestion was made promptly, as soon as the plaintiff company ascertained that the removal of the house would cause serious interference, and because the plaintiff company did not have that knowledge at the time of the conversation, it does not appear to the court to have been considered, nor that there could be any waiver or estoppel by the language then used.

The plaintiff's manager testifies that the only thing that he agreed to do was to take care of the wires, so the house could get on the street.

Of course the court cannot find that he expected the house to be moved out on the street and stay there, but the court does find that at the time of the conversation, the parties did not have any accurate knowledge of the extent of the interference with the pole line by the removal of the house down the street, nor did the plaintiff know that it would interfere at all, and therefore there is nothing in the conduct or the conversation of these parties that would vary the general rule in the cases already cited, that the prior occupancy of the company gave it vested rights.

It is said that if these poles were higher and further apart, there would not be so much interference, which, of course, would be true. It is also said that on account of the density of the foliage and the location of the trees, the line could not be otherwise located. But it appears to the court that the precise location of this line is a matter that rests within the control of the municipal authorities, acting, of course, not arbitrarily, but in good faith.

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No doubt the municipal authorities have the right to require the company to change lines of telephone poles, if the council in good faith so decide. But this telephone line being satisfactory to the municipal authorities, and leaving space sufficiently wide for ordinary travel, a person desiring to move a house cannot contend that the location is improper.

Finding and decree for the plaintiff.

CRIMINAL LAW—MUNICIPAL CORPORATIONS—NUISANCE.

[Hamilton Common Pleas, January, 1909.]

CHARLES SCHREIER V. ST. BERNARD (VIL.).

1. ORDINANCE PROHIBITING MANUFACTURE OF FERTILIZER IN MUNICIPALITY VALID.

An ordinance, making it unlawful for any person within municipal limits to manufacture fertilizer or other product from which offensive or unwholesome odors are given off, is a reasonable exercise of the discretion conferred upon municipalities by Sec. 7 of the Mun. Code of 1902 (Lan. Rev. Stat. 3102; B. 1536-100) giving them power to determine what is offensive, dangerous or unwholesome, and to prohibit it in so far as is reasonable and may be necessary to prevent injury or annoyance to the public.

2. ORDINANCE PROHIBITING ANYTHING AS DANGEROUS, ETC., PRESUMES CONDUCT OF SUCH BUSINESS TO BE INJURIOUS OR AN ANNOYANCE TO PUBLIC.

When an ordinance is regularly passed regulating or prohibiting anything as dangerous, offensive or unwholesome, it will be presumed, in the absence of clear and convincing evidence to the contrary, that such prescribed thing constitutes an injury or annoyance to the public; but, if the ordinance simply prohibits a specific act when it so results leaving the question of such results to be determined as one of fact when sought to be enforced, the question of annoyance or injury to the public must also be determined as an issue of fact.

3. AFFIDAVIT FOR PROSECUTION OF DANGEROUS, OFFENSIVE OR UNWHOLESOME BUSINESS DEFECTIVE IN FAILING TO AVER ANNOYANCE OR INJURY TO THE PUBLIC.

An affidavit in a prosecution for violating an ordinance, prohibiting or regulating anything as dangerous, offensive or unwholesome, failing to aver that the offensive odors were given off to the annoyance or injury of the public is insufficient.

[Syllabus approved by the court.]

ERROR to mayor's court.

D. S. Oliver, for plaintiff in error:

Cited and commented upon the following authorities: *Whitcomb v. Springfield*, 2 Circ. Dec. 138 (3 R. 244); *Sigler v. Cleveland*, 4 Dec. 166 (3 N. P. 119); *Cleveland v. Malm*, 7 Dec. 124 (5 N. P. 203); *Akerman v. Lima*, 8 Dec. 430 (7 N. P. 92); *State v. Wahl*, 35 Kan. 608 [11 Pac. Rep. 911]; *Commonwealth v. Smith*, 60 Mass. (6 Cush.) 80;

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Lippman v. South Bend, 84 Ind. 276; *Cornell v. State*, 66 Tenn. (7 Baxter) 520; *Commonwealth v. Megibben Co.* 101 Ky. 195 [40 S. W. Rep. 694]; *State v. Purse*, 4 McCord (S. C.) 472; Wood, Nuisances Secs. 861, 863; *King v. Dayton*, 18 Dec. 567 (8 N. S. 34); *State v. Frieberg*, 49 Ohio St. 585 [31 N. E. Rep. 881]; *Canton v. Nist*, 9 Ohio St. 439; *Thompson v. Mt. Vernon*, 11 Ohio St. 688; *Pope v. Cincinnati*, 2 Circ. Dec. 285 (3 R. 497); *State v. Prendergast*, 6 Circ. Dec. 807 (8 R. 401); *State v. Tooker*, 6 Dec. 464 (5 N. P. 122); *Bedford v. Tarbell*, 10 Dec. 337 (7 N. P. 411); *Cleveland v. Bryan*, 11 Dec. 473 (8 N. P. 552); *Burkhardt v. Cincinnati*, 18 Dec. 450 (6 N. S. 17); *Deming v. Cleveland*, 12 Circ. Dec. 198 (22 R. 1); *Frank v. Cincinnati*, 7 Dec. 544 (7 N. P. 146); *Bloom v. Xenia*, 32 Ohio St. 461; *Markley v. Mineral City* (VII.), 58 Ohio St. 430 [51 N. E. Rep. 28; 65 Am. St. Rep. 776]; *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118 [12 N. E. Rep. 445]; *Cleveland (City) v. Payne*, 72 Ohio St. 347 [74 N. E. Rep. 177; 70 L. R. A. 841]; *Collins v. Hatch*, 18 Ohio 523 [51 Am. Dec. 465]; *Hays v. St. Marys* (VII.), 55 Ohio St. 197 [44 N. E. Rep. 924]; *Bancroft v. Wall*, 6 Dec. 22 (29 Bull. 306); *Townsend v. Circleville*, 78 Ohio St. 122 [84 N. E. Rep. 792; 16 L. R. A. (N. S.) 914].

S. B. Hammel, for defendant in error.

HUNT, J.

On November 29, 1907, council for the village of St. Bernard passed an ordinance, of which Sec. 2 was as follows:

"Section 2. That it shall be unlawful for any person, whether he be owner, manager, superintendent, foreman or employe, within the limits of said village, to manufacture or produce, or assist in the manufacture or production of any fertilizer or other product from which, in the process of manufacture or production, offensive or unwholesome odors arise or are given off."

On October 22, 1908, the defendant was arrested upon a warrant of the mayor predicated upon an affidavit charging that "he, being an employe of the Joslin-Schmidt Company, did assist in the manufacture of fertilizer from which in the process of manufacture, offensive odors were given off, contrary to the form of the ordinance of said village in such cases made and provided."

The defendant was tried, convicted and fined. By proceedings in error, the question of the validity of such ordinance and of the sufficiency of the affidavit upon which the arrest was made, properly raised in the court below, is now before this court.

The authority to pass this ordinance is claimed under Sec. 7, Par. 3 of the Mun. Code of 1902 (Lan. Rev. Stat. 3102; B. 1536-100), which authorizes municipalities to pass ordinances "to prevent injury

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or annoyance from anything dangerous, offensive or unwholesome; to cause any nuisance to be abated."

As municipalities have those powers only which are expressly granted to them, and such as are necessary to carry out powers expressly granted, the first question is as to the scope of the section above referred to.

This section is a part of the municipal code. As such, especially when taken into consideration with other statutes applicable particularly to the prevention and redress of private wrongs, it is necessarily limited in its operation, in the absence of express provisions enlarging such operation, to the prevention of injury and annoyance to the public. Such being the construction to be given to this section of the municipal code, it follows that an ordinance passed under such section, must be in conformity with such construction.

An ordinance prohibiting and regulating anything as dangerous, offensive or unwholesome, must expressly or by necessary implication, be limited not only to things dangerous, offensive or unwholesome, but to those, the prohibition or regulation of which will tend to prevent injury or annoyance to the public. An ordinance general in terms, even when sustained, must by implication be limited to the subject-matter over which the municipality has power to legislate. There is no question but that under the power given by Sec. 7, Par. 3, a municipality has the right in the reasonable exercise of the discretion conferred, to determine what is offensive, dangerous or unwholesome, and to determine whether such thing is or would be an injury to the public, and having so determined, the municipality has the right by ordinance to regulate or prohibit such thing, in so far as it may be necessary to prevent injury or annoyance therefrom to the public. In so far as such regulation or prohibition is not unreasonable under existing or probable circumstances, such findings of the municipality and such ordinance will be sustained by the court.

When an ordinance is passed regulating or prohibiting anything as dangerous, offensive or unwholesome, it may be presumed in the absence of clear and convincing evidence to the contrary that such thing is dangerous, offensive or unwholesome, and is or would be an annoyance or injury to the public, and that the proposed regulation or prohibition would tend to prevent such injury or annoyance; and further, that such ordinance was passed in the reasonable exercise of the discretion conferred by the statute.

Where, however, the ordinance does not undertake to determine what is dangerous, offensive or unwholesome, but simply prohibits a specific act when it results in something dangerous, offensive or unwholesome, leaving the question of whether it does so result to be

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thereafter determined as a question of fact when the ordinance is sought to be enforced, the question as to whether it is an annoyance or injury to the public is also to be determined as a question of fact. An essential fact in any violation of such ordinance is that such act results in something not only dangerous, offensive or unwholesome, but that it be to the injury or annoyance of the public. Both are facts essential to constitute any offense claimed to have been committed under such ordinance.

An affidavit charging a violation of any ordinance must allege all the facts essential to constitute the offense. The absence in the affidavit in this case, of the allegation that the offensive odors were given off "to the annoyance or injury of the public," or words to that effect, makes the affidavit insufficient in law. The judgment of the court below will therefore be reversed.

CONTRACTS.

[Hamilton Common Pleas, March 15, 1909.]

C. W. PHILLIPS v. M. B. FARRIN LUMBER CO.

CONTRACT LACKING MUTUALITY AND TOO INDEFINITE AND UNCERTAIN TO BE ENFORCED.

A contract with a lumber dealer to "take what poplar, oak and chestnut you handle this year," there being no limit to the quantity or kinds of lumber to be handled, no possibility of ascertaining what amount might be handled, no limitation upon the territory from which it could be drawn, lacks mutuality and is too indefinite and uncertain as to amount of lumber to be furnished to fix any obligations or liabilities of the parties thereunder.

[Syllabus approved by the court.]

Frank Dinsmore, for demurrer.

Burch, Peters & Matthews, for defendant.

DEMURRER.

GORMAN, J.

This cause comes on to be heard on a demurrer of the defendant to the second cause of action set up in the petition on the ground that the allegations thereof do not state a cause of action.

The second cause of action is for damages for the alleged breach by the defendant of a contract which is in writing as follows:

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"Mr. C. W. Phillips,
Pierceville, Ga.

Dear Sir:

As per our conversation of this day, we will take what Poplar, Oak and "Chestnut" you handle this year at the following prices f. o. b. cars your shipping point. Cash less 2 per cent discount. (Here follows a list of the kinds of lumber and prices.)

Accepted

Yours truly,

C. W. Phillips

THE M. B. FARRIN LUMBER CO.,
WM. B. HAY,
V. P. and Treasurer."

In his first cause of action plaintiff sets forth that he shipped various car loads of lumber upon which he avers there is a balance due.

In his second cause of action he avers that during the year, to wit, on or about December 27, 1907, the following lumber was purchased by him, and defendant notified that he intended to, and did, furnish it to defendant and apply it on said contract, to wit: (Here is set out a list of lumber bought including the kinds agreed to be accepted by defendant—poplar, oak and chestnut.)

Plaintiff next avers that he notified defendant that he had the lumber last described, and that the defendant refused to furnish him shipping orders although requested so to do and that by reason thereof defendant having refused to accept said lumber, plaintiff has sustained damage.

The causes of action are very loosely and badly pleaded, nevertheless, it is apparent that the plaintiff intends to plead a refusal of the defendant to accept the lumber or to comply with the terms of the contract. The demurrer raises the question of the validity of this contract, upon two grounds.

First. The contract, it is claimed, is so indefinite and uncertain in respect to the amount of lumber to be furnished by the plaintiff under the contract that it is impossible to fix the extent of the liabilities and obligations of the parties thereunder.

Second. There is no mutuality of obligation, such as is necessary to constitute a binding contract.

The court is of the opinion that the quantity of lumber to be furnished under this contract is uncertain and cannot with any degree of certainty be ascertained.

The quantity of lumber that plaintiff could handle during the year is indefinite and might be so great as to be beyond the control of the defendant to accept or dispose of.

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There are numerous cases in the books where a contract of this character has been upheld where there was open a method of determining what quantity of goods could be delivered under the contract where a certainty could be arrived at by extrinsic evidence or by calculation. In such cases the maxim has been applied: "*Id certum est, quod certum reddi potest*;" but in no case has such a contract been sustained where the quantity that could be furnished could not be arrived at by one or the other method.

A few cases will serve to illustrate.

In *Loudenback Fertilizer Co. v. Phosphate Co.* 58 C. C. A. 220 [121 Fed. Rep. 298; 61 L. R. A. 402], our circuit court of appeals held that a contract that one shall buy all that he shall require for use in a particular manufacturing business for a certain time, is valid because, though the quantity bought and sold is indefinite, it is ascertainable by the terms of the agreement. The quantity of a certain article that a manufacturing plant can use in a given time is easily susceptible of calculation.

In *Brawley v. United States*, 96 U. S. 168 [24 L. Ed. 622], a contract to sell or furnish all of a certain kind of goods that may be manufactured by the vendor in a certain establishment is valid, because the quantity of the kind of goods that the designated establishment can produce is ascertainable.

In *Guillim v. Daniel*, 2 Crompton M. & R. (Eng.) 61, it was held that a contract to accept all the naptha that a manufacturer may make in two years, was valid in so far as it applied to the works then in operation and to its normal capacity, because the quantity thus to be produced could be ascertained.

A contract to sell all the rye straw defendant (a farmer) had to spare, was upheld in *Parker v. Pettit*, 43 N. J. Law 512, because by extrinsic evidence it could be ascertained how much the farmer would have to spare of the rye straw.

To the same effect are the following cases:

Smith v. Morse, 20 La. Ann. 220; *Minnesota Lumber Co. v. Coal Co.* 160 Ill. 85 [43 N. E. Rep. 774; 31 L. R. A. 529]; *Hickey v. O'Brien*, 123 Mich. 611 [82 N. W. Rep. 241; 40 L. R. A. 594]; *Dailey Co. v. Clark Can. Co.* 128 Mich. 591 [87 N. W. Rep. 761]; *Wells v. Alexandre*, 130 N. Y. 642 [29 N. E. Rep. 142]; *McCall v. Icks*, 107 Wis. 232 [83 N. W. Rep. 300].

In the case of *Lee Silver Min. Co. v. Smelting & Refin. Co.* 16 Col. 118 [26 Pac. Rep. 326], a contract to furnish the product of a certain mine for a fixed period at a certain price per ton, was held to be valid and to be a contract to purchase the entire output of ore mined and marketable from that mine. In deciding the case the court says:

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"True there was no agreement to furnish any ore, but the business of the appellant was mining and producing ore and it was to be presumed that it would mine and furnish it if in the mine and accessible."

In the case at bar, if the averments of the petition disclosed that the plaintiff was operating a mill or mills and the offer was to sell and deliver to defendant the entire output of his mill or mills, or if he proposed to furnish all the lumber that could be taken from a certain tract of land or tracts of land, or from a certain district or even a certain state, and that offer had been accepted, the court is of the opinion that such a contract would be good as against a demurrer. There is no limit to the quantity of the kinds of lumber to be handled (which would indicate that plaintiff was not a manufacturer of lumber but a buyer and seller of that commodity) by the plaintiff, no limitation upon the place or places from which he could draw his lumber to sell to the defendant, and in fact it would seem to be impossible to ascertain how much he might be able to handle or how much the defendant would be called upon to accept and pay for. It would seem to the court that this feature of the contract is entirely too indefinite and uncertain, and the measure of damages in case of a breach could not with any degree of certainty be arrived at. As was said by the learned court in the case of *Moses v. Marienthal*, 11 Dec. 607 (8 N. P. 404), the contract violates the rule of certainty as to subject-matter which is applicable to all contracts. There must be certainty of the subject-matter of the contract; in other words, the subject-matter of the agreement must be expressed by the parties in such terms that it can be ascertained to a reasonable degree of certainty, etc.

As was said in the case of *Ashcroft v. Butterworth*, 136 Mass. 511, 514:

"In agreements of sale and purchase the obligation must be certain, or capable of being made certain in regard to the quantity which the merchant agrees to sell or the vendee agrees to buy."

See also, *Crane v. Crane*, 45 C. C. A. 96 [105 Fed. Rep. 869]; *Chicago & G. E. Ry. v. Dane*, 43 N. Y. 240; *Houston & Tex. Cent. Ry. v. Mitchell*, 38 Tex. 85; *Thayer v. Burchard*, 99 Mass. 508.

In this last case the proposition was to carry freight for certain rates. It expressed no quantities and no means by which the quantities could be fixed, nor did the acceptance. Plaintiff was obliged to ship none at all by defendant's route, and might ship all he pleased by other routes. This contract was held invalid because it was lacking in definiteness.

The court is also of the opinion that this agreement cannot be sustained because it lacks mutuality of obligations. Nowhere in the pro-

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posal or the acceptance does the plaintiff bind himself to furnish any lumber at all. He agrees to sell to defendant all the lumber of the kinds described that he shall handle during the year, but he does not bind himself to handle any quantity of the lumber. He may refuse or neglect to handle any, and the defendant can have no recourse against him. If he were a manufacturer of lumber of the kind mentioned in the contract, the court would hold him to manufacture as much as he could reasonably produce during the year, and apply the production to the filling of the contract; but as we have seen, he is not a manufacturer and there is no limit as to the amount he could handle. There is no way of ascertaining and making certain the minimum or maximum quantity which plaintiff could handle during the year, of the lumber described, and therefore, he was not bound to furnish any quantity whatsoever.

In the case of *Artemus-Jellico Coal Co. v. Ulland*, 28 O. C. C. 437 (7 N. S. 605), our circuit court held:

“A contract for the sale of a certain proportion of the nut and slack produced from the operation of a coal mine is not mutually binding on the parties and cannot be enforced, when by its terms it is left entirely optional with the sellers whether or not they will separate any or all of the nut and slack from the run of the mine.”

See also, *Cold Blast Transp. Co. v. Bolt & Nut Co.* 52 C. C. A. 25 [114 Fed. Rep. 77; 57 L. R. A. 696].

While there is an apparent conflict of authorities on the question of whether or not a contract which provides that one party shall furnish and the other party pay for an indefinite quantity of merchandise, it will be found that the great weight of authority is to the effect that if the quantity, although indefinite, can be ascertained by extraneous testimony, the contract will not be held invalid for uncertainty. And if the contract is one whereby one party agrees to furnish to another all the goods the second party may need in a certain manufactory or establishment, although the quantity is not stated, yet if it can by the aid of extraneous evidence be made certain and shown that the party, who is to receive the goods, binds himself not to buy from another, then the courts will hold the vendor to furnish all the other party requires, although the vendor has not bound himself to furnish any quantity whatsoever.

The question of the mutuality of the obligation to perform seems to turn largely on the question of whether or not the contract is certain as to the quantity to be delivered, or can, by the aid of extraneous evidence, be made certain.

If the contract is certain as to quantity, or can be made so by evidence, then the courts will hold the contract to be mutually binding

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upon the parties. If it is uncertain as to quantity and cannot be rendered certain in that respect by the aid of extraneous evidence, the courts will hold the contract to be invalid, not only because of indefiniteness, but because of a lack of mutuality.

Having arrived at the conclusion that this contract is lacking in definiteness and mutuality, the demurrer to the second cause of action, which is based upon this contract, must be sustained.

CRIMINAL LAW AND PRACTICE.

[Hamilton Common Pleas, January 15, 1909.]

JACOB STIEF V. CINCINNATI.
THOMAS GEORGE V. CINCINNATI.

1. NECESSITY OF WARRANT IN POLICE COURT PROSECUTIONS.

A police court has no jurisdiction to hold, try, or impose sentence upon, an accused person for whom no warrant, charging him with the commission of a crime, has been issued; arraignment, trial and sentence upon an affidavit, without warrant, render its proceedings null and void.

2. ACCUSED BEING HELD ON FELONY CHARGE SHOULD BE DISCHARGED AS TO MISDEMEANOR.

One charged with a misdemeanor and a felony, being held to answer for the felony, should be discharged as to the misdemeanor under Sec. 1790 (Lan. 3301; B. 1536-810) Rev. Stat.

[Syllabus approved by the court.]

ERROR to the police court of Cincinnati.

G. S. Hawke, for plaintiffs in error.

J. M. Thomas, Jr., for defendant in error.

GORMAN, J.

The above two entitled proceedings in error were argued and submitted together, and inasmuch as the grounds of error are alleged to be the same in both proceedings, they will be considered and disposed of together.

In the case of Stief against the city, the petition in error filed in the court assigns seven grounds of error upon which it is claimed that this court should reverse the judgment of the police court of the city of Cincinnati. But only two of the alleged assignment of errors, in the opinion of the court, have merit, viz.:

Third. Said court erred in that the findings and judgment are contrary to law; and

Fifth. Said court erred in finding the plaintiff in error guilty, and in fining him \$50 and costs.

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This court cannot consider either case on the weight of the evidence, for the reason that the bills of exceptions in both cases recite at the bottom of page 7 that "the foregoing was not all the evidence offered by the city of Cincinnati or the defendant or either of them," etc., and it is well established that the reviewing court cannot consider or pass upon the weight of the evidence unless the record shows that the bill of exceptions contains all the evidence offered by both parties.

The prosecution against the plaintiff in error was begun by his arrest without a warrant by an officer of the city of Cincinnati, on a charge of carrying a concealed weapon, a revolver, on his person. After his arrest, the officer, Frank L. McNeal, made and filed an affidavit in the police court of the city of Cincinnati charging Stief with carrying concealed on his person, on May 30, 1908, a deadly weapon, a certain revolver loaded with powder and ball, but whether contrary to the statute or to the ordinance, the affidavit fails to state. However, from the fact that the caption of the case on the back of the affidavit is, "The State of Ohio v. Jacob Stief," it may be fairly assumed that it was intended to charge a violation of the statute.

Section 6892 Rev. Stat. makes it an offense to carry, concealed on one's person, a pistol or other dangerous weapon, and fixes the penalty for a violation of the statute at not more than \$200 fine, or thirty days' imprisonment, etc.

There was no warrant issued on the affidavit of the officer against Stief, and he was arraigned and tried on the affidavit alone. He was fined \$50 and costs; and of that judgment he complains. A motion for a new trial was made and an alleged bill of exceptions taken, and the same together with an alleged, but imperfect and defective transcript of the docket and journal entries is filed with the petition in error.

In the language of the late lamented Judge James M. Smith, announcing the opinion of our circuit court in the case of *Pope v. Cincinnati*, 2 Circ. Dec. 285 (3 R. 497), on page 286:

"It is manifest that the proceedings in this case were loosely conducted, and * * * are not in accordance with the plainest principles of law and of practice."

The record discloses that on June 1, 1908, when the plaintiff in error was arraigned on the affidavit in the police court, an entry was directed by the court to be made, setting forth that this cause coming on to be heard this day upon the affidavit and warrant filed herein (the record shows no warrant filed), charging this defendant with carrying concealed weapons, and the defendant being in court and arraigned, and pleading not guilty, and the proof showing that the defendant is guilty of "shooting with intent to kill," and has committed a felony; and the prosecutor of this court having filed a proper

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affidavit charging the defendant with "shooting at to kill," the court orders this defendant to be held in the sum of \$1,000 to answer at the court of common pleas, and in default of bail is committed to the county jail.

Now the plaintiff in error complains that the police court upon making the above finding and order, should have discharged him as to the misdemeanor charged in the affidavit in accordance with the provisions of Sec. 1790 (Lan. 3301; B. 1536-810) Rev. Stat. But the record discloses that the plaintiff in error was not discharged on the misdemeanor or charge of carrying concealed weapons, but on the contrary the judge of the police court ordered said cause and charge to be placed on the open docket, whatever that may mean, in law. The case was continued from time to time in the police court, and finally on June 18, 1908, the plaintiff in error, against the objection of his counsel, was tried and found guilty of carrying concealed weapons and adjudged to pay a fine of \$50 and costs.

The question now before this court is, was there error in the record of this cause prejudicial to the plaintiff in error. This court is of the opinion that there was such error in the trial of this cause, and the same appears in the record thereof filed herein.

First. This court is of the opinion that the police court of the city of Cincinnati had no jurisdiction of the person of the plaintiff in error and, therefore, had no power or authority to try his cause or impose sentence upon him, for the reason that no warrant was ever issued upon which he was arrested, arraigned and tried, and therefore the whole proceedings in the police court are null and void. *Eichenlaub v. State*, 36 Ohio St. 140.

In that case, as in the case at bar, an affidavit was made and filed, but no warrant was issued, except a search warrant.

The prosecuting attorney of the police court of Cincinnati proceeded to try Eichenlaub on an information, the return of the search warrant not showing that any person had been arrested. Eichenlaub was convicted in the trial in the police court, and prosecuted error to the Supreme Court. Without setting out in full the decision of the court in this case, we feel warranted in holding on this authority that the doctrine therein laid down is, that a warrant in every case brought to trial is indispensable. The court there holds that there is no authority to try a person on information in the police court of Cincinnati. And further, the court on page 142 uses this language:

"The present constitution provides (Art. I, Sec. 14), 'The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by

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oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

And on page 144, the court, applying the above cited article and section of the constitution, says:

"We are of opinion, therefore, that by force of this constitutional provision (Art. I, Sec. 14), and others in harmony with it, the conviction of Eichenlaub is erroneous, for he was never charged on oath or affirmation with larceny or receiving stolen goods. But a fair construction of our statutes requires us to say, that our legislature has never authorized proceedings in a criminal case, unless such information was based on a warrant issued upon oath or affirmation, charging the person informed against with the commission of a crime. * * * And so it is with the police judge. He has in criminal cases the same jurisdiction as a justice of the peace (66 O. L. 176, Sec. 1787 Rev. Stat. [Lan. 3297; B. 1536-806]) and a fair construction of the various statutes relating to the subject, requires us to say, that such jurisdiction" (of the police court) "must be invoked in the same way, that is, by warrant founded on complaint made under oath or affirmation. True, the statute provides, that 'the mode in which business shall be brought before the court shall be fixed by ordinance or rule of court; and that 'the judge shall adopt such rules of practice and procedure as will give all parties a proper statement of any charge against them' (66 O. L. 177; Secs. 1794, 1795 Rev. Stat. [Lan. 3305, 3306; B. 1536-814, 1536-815]); but this does not have the effect of, and, for the reasons already given, could not dispense, with the warrant, founded on oath or affirmation, required by the constitution and laws." Constitution of 1851, Art. I, Sec. 14; Secs. 7129, 7130, 7131 Rev. Stat.

There can be no detention of any one for a longer time than is necessary to secure a warrant under our laws, and neither the arresting officers nor the court can legally hold and try anyone until a warrant is first obtained, and this warrant must be based upon information on oath or affirmation. The practice of holding and trying persons charged with offenses without issuing a warrant before trial is reprehensible in the extreme, and in contravention of guaranteed constitutional rights of the citizens and inhabitants of our state. There can be no excuse for this practice except the excuse of ignorance of the constitution and laws of our state, or a desire to evade a plain duty and ignore the letter and spirit of the laws. Carelessness and slovenliness, especially in the officers of the law sworn to execute and administer them, cannot fail to breed disrespect for the laws by those of our citizens not supposed to be so well informed on the laws and our constitution.

Second. The court is of the opinion that Sec. 1790 (Lan. 3301;

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B. 1536-810) Rev. Stat., which is under the subdivision of police courts in Title 12, Div. 5, Chap. 3 of the Revised Statutes, applies to both the cases at bar. That section in substance provides that where the charge is a misdemeanor, and the proof shows that the party has committed a felony, the court, upon the proper affidavit being filed, shall discharge the party as to the misdemeanor, and admit him to bail, or commit him as the case may be, for the felony.

Now, the journal entry made in the police court on June 1, 1908, in both cases finds that the proof shows in both cases that the accused had committed a felony—"Shooting at to kill"; and further finds that the prosecuting attorney of the police court has filed a proper affidavit charging the defendant with the felony, and the court orders the defendant in each case held in the sum of \$1,000 to answer to the court of common pleas, but fails to direct an entry to be made discharging the accused in each case, and this is one of the errors complained of in this proceeding.

It seems to the court that the purpose of the legislature in enacting this section, was to provide that where a lesser offense than felony was charged and it appeared on the preliminary hearing that a felony had been committed, the state should elect to hold the accused on the greater offense, felony, and permit the misdemeanor to be merged as it were in the greater offense. It has been urged upon the court that this section means that where the evidence discloses on the preliminary trial that the acts committed by the accused constitute a felony, but by inadvertence, mistake or want of entire knowledge of the facts, the party making the affidavit for the warrant, or the officer arresting without a warrant, supposed that a misdemeanor only had been committed, and had so charged, then upon a disclosure that the acts committed constitute a felony, the court must discharge the accused on the misdemeanor charge. There is force in this argument, but upon a close and careful reading of this section, the court is of opinion that if the legislature had intended this section to mean what is claimed for it by the prosecuting attorney of the police court, it could and would have made it clear that such was the intent and meaning: The legislature could have said "and when the proof shows that the act committed by the accused party is a felony as defined by statute," etc., he shall be discharged, etc.

In order to find the meaning of this statute to be that claimed for it by the prosecuting attorney of the police court, the court would be obliged to read into the statute or import to it language not found therein. This can not be done as it would be judicial legislation, and courts are not warranted in encroaching upon the powers, prerogatives and functions of a co-ordinate branch of the government.

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The court is therefore of opinion that the police court of the city of Cincinnati erred in not discharging the accused parties on the misdemeanor charges in both cases, upon finding that they had committed a felony. They were held on the felony, and properly so, but should have been discharged in the same entry on the misdemeanor charges. The reasoning herein employed is applicable to both cases, for while the charge of the misdemeanor in one case is carrying concealed weapons and in the other, George's case, disorderly conduct, they were both arrested at the same time, in the same room, and were brought to the police court and tried together; the same evidence being used to convict both, and but one trial given and that a joint trial. The same entry holding them on the same charge of felony was made in both cases, and the errors committed were committed as to both.

For the reasons assigned the judgment of the police court of the city of Cincinnati will be reversed, and this court now proceeding to render the judgment which the police court of the city of Cincinnati should have rendered, does hereby discharge and dismiss both of the accused parties.

Let a journal entry so record the judgment.

ANIMALS—CRIMINAL LAW.

[Licking Common Pleas, September Term, 1903.]

JOHN B. MICK v. STATE OF OHIO.

1. PROSECUTION FOR TORTURING AND UNNECESSARILY ABUSING DOG.

A dog is an animal, within the meaning of Sec. 6951 Rev. Stat., for the torturing or unnecessarily abusing of which one may be prosecuted criminally; it is not necessary that the dog become property by returning him for taxation and payment of taxes when due, as provided by act 94 O. L. 118 (Lan. Rev. Stat. 6949; B. 4212-1); nor will the provisions of the latter statute against dogs running at large relieve against prosecutions for such torture and abuse.

2. FAILURE TO ALLEGE DOG AT LARGE RENDERS AFFIDAVIT DEFECTIVE.

An affidavit in a prosecution for torturing or unnecessarily abusing a dog is defective unless it alleges that the dog was not at large.

[Syllabus approved by the court.]

ERROR to justice of the peace.

S. L. James and Kibler & Kibler, for plaintiff in error.

Smythe & Smythe, for defendant in error.

SEWARD, J.

This case comes into this court upon a petition in error by John B. Mick against the state of Ohio, wherein he complains that there were

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errors committed by the justice of the peace in the trial of John B. Mick upon a charge of torturing and unnecessarily beating a dog.

The dog has been in every legislature for a number of years, not as a member but as a recipient of its mercy or a subject of its punishment; and I have gone over the legislation for a number of years in relation to the dog to determine what his rights and remedies are.

The Revised Statutes of 1880, being the authorized revision, contains Sec. 7008, which provides that the owner or harbinger of any animal of the dog kind who permits such animal to be at large, away from the premises occupied by him, unaccompanied by any person, shall be fined five dollars, and any person may kill any such animal so found running at large.

This legislation was passed May 5, 1877 (74 O. L. 177) and was carried into the Revised Statutes by the commission appointed to revise the laws, and remained in that shape until April 24, 1890 (87 O. L. 269), when the dog received more attention at the hands of the legislature, and Sec. 7008 was amended by adding to that section as it then stood the words: "provided that if any person, in attempting to kill such animal so found running at large, fails to kill and wounds the same, he shall not be liable to prosecution under Sec. 6951." That is the section under which the state of Ohio claims that the plaintiff in this case was prosecuted before the justice; while the plaintiff in error claims that he was prosecuted under the act of April 19, 1898 (93 O. L. 128), providing that whoever maliciously kills or injures a dog is guilty as for the malicious destruction of property, the same as is provided in Sec. 6863. This section provided that a dog should be considered as property, and provided that whoever stole or enticed the dog away from the owner's premises should be held guilty as for larceny, and that whoever maliciously killed or injured him should be held guilty as for the malicious destruction of property.

Act 94 O. L. 118 (Lan. Rev. Stat. 6949; B. 4212-1) now governing in the way of dogs reads as follows:

Section 1. "Any animal of the dog kind listed and valued for taxation as other [personal] property, and due return thereof made by the owner or harbinger to the assessor or county auditor and the per capita tax upon such animals in addition to the proper tax on any valuation which may have been placed on such animal by the owner or harbinger thereof shall have been paid, when due, shall be considered as property, and such animal shall have all the rights and privileges and be subject to the same restraints as are provided by law for other live stock; provided that no recovery shall be had for the malicious and unlawful killing of such animal, in excess of double the amount for which any such dog is listed for taxation; provided, further, that noth-

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ing in this section shall be so construed as to make it unlawful for any person to kill any animal of the dog kind, that chases, worries, injures or kills any sheep, lamb, goat, kid, domestic fowl, animal or person; and provided, further, that if any person in attempting to kill such animal so running at large, fails to kill, and wounds the same, he shall not be liable to prosecution under Sec. 6951 which provides against cruelty to animals.

Section 2. "Any animal of the dog kind that chases, worries, injures, or kills any sheep, lamb, goat, kid, domestic fowl, animal or person, may be killed by any person, at any time or place. And the owner, owners or harborers of any animal of the dog kind that chases, worries, injures, or kills any sheep, lamb, goat, kid, animal or person, shall be jointly and severally liable to any person so damaged to the full amount of the injury done; and the court or justice, before whom the recovery is had for any such injury shall declare the animal found to have occasioned the injury to be a common nuisance and order the defendant to kill or cause to be killed such animal within twenty-four hours after the rendition of the judgment; or the court or justice may order any constable or marshal or sheriff to kill such animal."

I might say that the state of Ohio claims that this prosecution was brought under Sec. 6951 Rev. Stat. and it might be well to read that section, because we have to determine whether the case was brought under that section, and properly brought under that section. That section reads as follows:

"Whoever overdrives, overloads, tortures, deprives of necessary sustenance, or unnecessarily or cruelly beats, or needlessly mutilates or kills any animal, or impounds or confines any animal in any place and fails to supply the same during such confinement with a sufficient quantity of good, wholesome food and water, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner, or who keeps cows or other animals in any inclosure without wholesome exercise and change of air, or feeds cows on food that produces impure or unwholesome milk, or abandons to die any old, maimed, sick, infirm or diseased animal, or works the same, or, being a person or corporation engaged in transporting live stock, detains such stock in railroad cars, or in compartments for a longer continuous period than twenty-four hours after the same are so placed, either within or beyond this state, without applying the same with necessary food, water and attention, or permits such stock to be so crowded together as to overlie, crush, wound or kill each other, shall be fined not more than two hundred nor less than five dollars, or imprisoned not more than sixty days, or both."

Now, looking at the averment of the affidavit alleging that the

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dog was listed for taxation. That was not necessary under this provision of the statute, but that allegation is made, and that is the reason that the plaintiff in error claims that it is prosecuted under Sec. 4212-1, which I have read, providing that a dog shall be listed for taxation, and if he was so listed, that he became property; and it provides also that the tax on him must be paid before the owner of the dog could recover compensation for his loss by being killed by anybody. It is claimed on the part of the plaintiff in error that this section does not apply, because a dog is not an animal such as is provided for in this section. The court does not think that is tenable; the court thinks he is an animal, and other things being equal he would come under this provision of the statute. It provides not only for animals used in the daily business or avocation of life, but all animals, whether domestic or otherwise. A person would have no right to tie up a dog and leave that dog without food, knowing it was tied up and doing it for the purpose of having it starve to death. It is for the purpose of preventing cruelty to animals that this section was passed.

But, the testimony shows that this dog was at large in the streets of the city, and shows that he had been at large, and the section of the statute governing in this respect, as it now exists is Sec. 4212-1.

"Any animal of the dog kind listed and valued for taxation as other [personal] property, and due return thereof made by the owner or harborer to the assessor or county auditor and the per capita tax upon such animals in addition to the proper tax on any valuation which may have been placed on such animal by the owner or harborer thereof shall have been paid, when due, shall be considered as property, and such animal shall have all the rights and privileges and be subject to the same restraints as are provided by law for other live stock."

It is claimed by the plaintiff in error that this dog is not property because the tax upon him was not paid. That is true. He would not be property unless he had been returned for taxation, and the tax was paid. But, does the fact that the dog is not property prevent Sec. 6951 Rev. Stat. from having effect where the dog is tortured or unnecessarily beaten and injured? The court thinks not. If he is unnecessarily tortured, the person would be liable under Sec. 6951, other things being equal.

Now, it appears clearly to the mind of the court that this dog was at large, without being accompanied by its owner. I know it is claimed that this was his old home, and it is said by some one that a dog will follow its owner wherever he may go; he may be a man of affluence and be reduced to penury, but the dog will follow him to a hovel and there lie at his door. That is true, but then the owner must

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take care of the dog. He must not permit the dog to run at large. If he does permit it to run at large, any person has a right to kill him.

The testimony shows that this dog was in Mick's yard on the twelfth of April; that Mrs. Mick took hold of him and tried to put him out of the yard, and did not succeed. The dog rebelled; he did not want to go out of the yard. She had him by the collar, trying to lead him out; Mr. Mick told her to leave him alone; that the dog might bite her; and there is one witness, only, who testifies that she saw Mick kick this dog, and that he raised him clear off of the ground. It is testified that the dog would weigh 150 pounds. This witness lives some distance east of Mick's house, across the street; afterwards she took the stand and said that she did not mean that he lifted the whole dog off of the ground, but a part of it. Now, Mick testified that he opened the gate with his right hand and pushed him out with his foot, against the hind part of the dog. Mick is corroborated by two witnesses who were on Mick's porch at the time, and by some neighbors. They say that they saw all that he did to the dog. But the dog is found in a bad condition. There is some difference between the witnesses as to where he was hurt. Some of the witnesses say on the right side, and some on the left side. Dr. Jones says his testicles were badly swollen, etc. But on the eleventh inst. the dog was taken about two miles east of Newark by the father-in-law of the owner of the dog, where he stayed and was there about 11 o'clock on Sunday morning, and that was the last that was seen of him, there, but he was in Mick's yard about noon or shortly afterwards.

If the court is to believe this testimony—that Mick simply took hold of the gate and put his foot against his hind part and pushed him out of the gate—he could not have effected any such injury as is claimed to have been inflicted upon that dog. The dog was not at home. Mick had a right to put him out of his yard. He had a right to use the necessary force to eject him from his yard. The dog hadn't any business in that yard. If Mick used only such force as was necessary to eject him from the yard, then he would not be liable either civilly or criminally. The dog might have been hurt in some other place, on some other occasion than this time, and the burden was on the state to show to the justice; beyond a reasonable doubt, that what Mick did there to that dog caused the injury which afterwards the dog was found to have sustained. Dr. Jones was not called for some days afterwards. There is some testimony to show that the dog was out on the street before Dr. Jones was called to see him. That is disputed. The testimony is all in dispute about that feature of the case; but the law, as the court has read from 94 O. L. 118, is the law governing dogs in this respect, including Sec. 6951 Rev. Stat., which provides for the punishment of a person who tortures or abuses an animal.

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Now, the court does not think that Mr. Mick could have been held to this charge, unless he used more force than was necessary to eject that dog from that yard; and the preponderance of the testimony, as the court views it, was clearly that he did not use any more force than was necessary. It is said by some of the witnesses that he threw stones at the dog, but no one says that he hit him; not anybody; and he says he simply threw some pebbles and told the dog to go home. It is in evidence that the dog howled, and went across the street, and was in other yards and came back there. The court does not think that this testimony shows, beyond a reasonable doubt, that Mick inflicted the injury which was shown to have caused the dog the pain that he seemed to have suffered afterwards. This must be shown beyond a reasonable doubt, and the court thinks clearly that there is a very reasonable doubt here as to whether Mick inflicted this injury.

I very much doubt whether this affidavit is good, unless it alleges that the dog was not at large. I think if the dog was at large Mick would have a right to kill him, and I think the affidavit should state and the burden is on the state to show that the dog was not at large at the time the injury was inflicted.

The judgment will be reversed.

ATTORNEY AND CLIENT—MALPRACTICE—PLEADING.

[Williams Common Pleas, January 25, 1909.]

***ANNA TRESSLER LONG v. CHARLES A. BOWERSOX.**

1. MALPRACTICE AGAINST ATTORNEY BARRED IN ONE YEAR.

Section 4983 Rev. Stat. prescribing a one year's limitation for the bringing of an action for malpractice applies to attorneys at law as well as physicians and surgeons.

2. FAILURE TO INFORM CLIENT OF FACTS ACQUIRED FROM FORMER CLIENT NOT MALPRACTICE.

One retaining an attorney at law to secure for her the administration of her deceased husband's estate under Sec. 6005 Rev. Stat. is not entitled to information acquired by her counsel in a prior professional relation concerning the execution of a will by a brother of her husband in which he devised his property to his mother, notwithstanding the fact that such knowledge and its consequent legal advantage to plaintiff if known to plaintiff might have enabled her under Sec. 5943 to prevent the beneficiary thereof from taking under the will for failure to probate it until after the mother's rights were forfeited, and have saved her expense of litigation by reason of the probate thereof. Nor can such litigation be deemed the obvious and natural sequence of the refusal of the probate court to

*Error not prosecuted. This action dismissed by plaintiff following this opinion.

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appoint her administrator upon which to found an action for malpractice without other facts to explain how such damages flowed from the facts complained of.

3. ESSENTIALS OF PETITION FOR MALPRACTICE.

In an action for malpractice against an attorney at law the pleader is required to set up (1) the relation between the parties, (2) such pertinent facts touching which the dereliction of duty by the defaulting party may be seen to support the complaint of injury, (3) negligence with reference to such facts of a character to suggest that injury may flow therefrom and, (4) allegations of damages constituting the proximate result of the negligence alleged. Unless the connection between the successive propositions and elements be apparent from the statement of them, the pleading must inform how one element flows into another by additional averments. The *actus* must either be obvious or specially pleaded.

4. PETITION FAILING TO ALLEGE FACTS UPON WHICH TO BASE MALPRACTICE.

A petition in an action for malpractice against an attorney-at-law, alleging his retainer to secure plaintiff the administration of her husband's estate; the death of her husband's brother testate devising his ancestral property to his mother who failed to probate the will until after the statute of forfeiture had run; the attorney's assistance in probating such will; his having knowledge of the existence of the will and neglecting to inform plaintiff and the court of the fact of forfeiture; failure thereby to secure the coveted appointment, and damages as a result thereof, does not state sufficient facts to sustain the action.

5. INCORPORATION OF PRIOR AVERMENTS IN SUBSEQUENT CAUSES OF ACTION BY REFERENCE CONDEMNED.

Incorporation of the averments of prior causes of action into another cause of action by reference only renders such a cause of action specially vulnerable to demurrer, if the facts in such references are not otherwise pleaded, and are essential to such cause of action.

[Syllabus approved by the court.]

B. F. Ritchie, for plaintiff.

Gaudern & Estrich, Newcomer & Gebhard and O. C. Beechler, for defendant.

KILLITS, J.

This cause is before the court on general and special demurrers to the petition. The petition sets out three alleged causes of action. For her first cause of action plaintiff says that she is the widow of John P. Long, deceased, and that in June, 1906, being herself unversed in the law and procedure therein, she employed defendant to attend to all her legal business generally, and that such employment was by defendant accepted and entered upon; that defendant was, then, had been for a long time and still is, engaged in the practice of law in Williams county, Ohio, as a member of the bar of this state. That in the month of December, 1906, John P. Long, her husband, being then deceased, "the defendant having been then continuously in the employ of the plaintiff since the said date first aforesaid, she instructed the defendant as attorney to prosecute a motion and application on behalf of this plaintiff in the probate court of Williams county, Ohio, for the appointment of this plaintiff as administratrix of the estate of the said John P. Long,

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aforesaid;" that defendant filed such application December 27, 1906, and thereafter, in all the proceedings following the same, he acted as plaintiff's attorney. That at said last named time "defendant had within his personal knowledge certain information," hereinafter set forth in this pleading, which it was important that this plaintiff should receive, and the plaintiff says, that "this defendant wilfully concealed from the plaintiff the said information which was within his personal knowledge and that this defendant was thereby guilty of fraud upon the plaintiff, and this plaintiff further says, that the defendant could, by the exercise of due diligence, care and skill, and by invoking to the benefit and use of this plaintiff the said information that was within his knowledge, have obtained the allowance of said motion and application and the appointment of this plaintiff as administratrix, as aforesaid, but that he negligently and unskillfully conducted said proceedings aforesaid; that said application was not granted, whereby plaintiff was deprived of her right to be appointed as said administratrix; and was put to great costs and expense and greatly damaged, as will more particularly appear hereinafter in this pleading." The petition, in this first cause of action, details the death of her husband's father, George E. Long, and the terms of his will, all of which is fully covered by the opinion of this court at the February, 1908, term of this court, in *Gillis v. Long*, 19 Dec. 253 (9 N. S. 1), wherefore we will not quote such part of the pleading here, and proceeds to aver that Parker W. Long, her husband's brother, executed a will in July, 1902, wherein he attempted to give all his property absolutely to his mother, Harriet Long; that the defendant drew this will for Parker and was one of the subscribing witnesses, and read the will to the testator and to Harriet, and then and there delivered the same to Harriet; that Parker died November 30, 1902, leaving this will in the possession and control of Harriet, and that at said time there were living of the Long family, the mother Harriet, John, and John's wife, this plaintiff; that John P. Long died in August, 1906, and that a dispute having arisen between plaintiff and Harriet respecting plaintiff's claims in John's estate, November 12, 1906, Harriet caused the will of Parker to be offered for probate, but failed to cause plaintiff to be notified of such intended probate and that the will was admitted to probate November 14, 1906, without the knowledge of plaintiff; "that this defendant knew that this plaintiff had not been made a party to the probating of said paper writing aforesaid and that this defendant knew that this plaintiff had no knowledge of the probating thereof; and that this defendant knew that the interests of this plaintiff in the estate of the said John P. Long aforesaid were materially affected by the probating of said paper writing aforesaid and that this defendant notwithstanding the prem-

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ises did appear in open court and assist in the probating of said paper writing aforesaid and that this defendant did wilfully conceal from the plaintiff the knowledge the defendant had of the paper writing aforesaid and of its having been admitted to probate."

This cause of action then sets up the fact that when her application for letters of administration was filed with the probate court by defendant the law of Ohio provided (Sec. 5943 Rev. Stat.), that a devisee who had knowledge of the will under which he was beneficiary, or who had the same in his power to control, should lose his devise if he neglected to cause the will to be offered for probate within three years after testator's death, and that the defendant herein then had knowledge of such law, and that he then knew that the will of Parker had been in the power and control of Harriet for more than three years after Parker's death, and that she was the sole devisee and legatee thereunder, and that she had failed to cause it to be offered for probate for more than three years, "and that notwithstanding the premises this defendant carelessly, negligently and wilfully failed to acquaint plaintiff with the information aforesaid that was within his knowledge, and this defendant carelessly, negligently and wilfully failed to acquaint plaintiff with the provisions of said section of the statutes aforesaid, or to invoke the same in said proceedings to her use and benefit, by reason whereof the probate court aforesaid refused to allow the said application and did refuse to appoint this plaintiff and said administratrix as would not have been the case had defendant not carelessly and negligently acted as aforesaid;" that by reason of this state of facts plaintiff was put to the expense of \$708 in court costs and traveling expenses in the endeavor to secure the administration of this estate, and also, because of the premises "a long continued expensive and unnecessary litigation ensued to this plaintiff," to plaintiff's damage in the sum of \$6,115.30, "in the employment of attorneys, traveling expenses, court costs, interest on moneys and loss of time from her legitimate employment."

"For a second cause of action the plaintiff, repeating all and singular the allegations in the first cause of action herein," avers that one Gillis, having become the administrator of her husband's estate, made application, to the defendant's knowledge, to sell certain of the real estate devised to her deceased husband, John P. Long, and that said application was granted, and that, at such time, October 17, 1907, the law of Ohio, to defendant's knowledge, provided that lands to be sold on the application of an administrator of an estate should be offered upon terms of one-third cash and one-third in one year and one-third in two years, and not otherwise, yet, to the knowledge of defendant, Gillis caused the order of sale to be entered for cash in hand, and that

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"defendant carelessly, negligently and purposely failed to advise plaintiff" of the statute or to invoke the same to the use and benefit of plaintiff, and that "by reason of the premises this plaintiff, upon discovery of the character and terms of said order of sale aforesaid, was put to great expense in the sum of \$160 for attorney's fees, traveling expenses and loss of time from her legitimate employment in securing the vacation of said order of sale aforesaid."

"For a third cause of action the plaintiff, repeating all and singular the allegations in the first and second causes of action herein, says that the aforesaid Denmark farm" was sold upon the order of sale January 25, 1908, the plaintiff purchasing one of the parts, and that the administrator applied to the court February 14, 1908, for confirmation, but that defendant, at the time set for hearing of the motion for confirmation, "did purposely, and wilfully by misrepresentation to the court, and without reason, and without the authority of the plaintiff, cause the hearing of said application to be postponed until March 9, 1908, by reason of which plaintiff was damaged in the sum of to wit, \$70 for loss of time from her legitimate employment."

The prayer is for judgment against defendant in the sum of \$7,-053.30, the aggregate of the damages claimed in the three causes.

The special ground of demurrer raises the statute of limitations to the first and second causes, and the position of defendant is that Sec. 4983, which limits to one year from accrual of right to sue actions "for libel, assault, battery, malicious prosecution, false imprisonment or malpractice," applies to defeat plaintiff, the alleged negligence in the first cause having occurred in November, 1906, and that relied on in the second October, 1907.

To this plaintiff's counsel insists that the word "malpractice" is limited to describing an action founded upon the negligence of a physician or surgeon, and is not used with reference to the right to damages in a client against his attorney for negligent conduct of the business in hand. In this behalf we are cited to the definitions in Webster, Standard Dictionary, Century Dictionary, Rapalje and Lawrence's Law Dictionary, Bouvier's Law Dictionary, Jacob's Fisher's Digest, and the first edition of American and English Encyclopedia of Law. It is true that in all these works of definition, to which may be added Anderson's Law Dictionary, the word is treated as referring especially to negligence of physicians and surgeons. Counsel for plaintiff also refers us to several decisions which are not very decisive, as they define particularly what would be malpractice in a physician and do not necessarily exclude the use of the word with reference to professional negligence of attorneys at law.

On the other hand counsel for defendant cite, Green and Kelly's

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Ohio Pl. & Prac. 61; Bates' Pleading, (1 ed.) 288; 2 Bates' Pleadings, (2 ed.) 987; 1 Kinkead's Code Plead. 757; 1 Bates' Ohio Dig. Col. 1563; the American Digest, under the general title of "Attorney and Client;" and also under the title of "Malpractice;" the Century Digest, under the title of "Malpractice," and also in Vol. 5, Col. 1669; 19 Am. & Eng. Enc. Law, (2 ed.) title, "Malpractice;" 8 Michie's Ohio Enc. Dig., title, "Malpractice;" 5 Laning's Ohio Cyc. Dig., title, "Malpractice," and 6 Thompson, Negligence 962, in which the word is used as referring to the negligence of both physicians and attorneys.

In view of this greatly preponderating mass of authority, especially from the Ohio practice, we are inclined to think that the word as found in Sec. 4983 Rev. Stat. refers to actions against attorneys as well as against physicians. The word was inserted in the statute for the first time in an amendment adopted in 1894. At that time Green and Kelly's Ohio Pleading and Practice was in extensive use by the Ohio Bar, while Bates' Pleadings and Bates' Digest were found in every law office in the state that made any pretense in the practice of the law. In construing wills it is a settled rule of interpretation that where any word or phrase has received special legal meaning such definition shall be given to it, unless it is plain that testator did not employ it in that sense. So, also, it is settled that when words have a restricted or peculiar meaning when used with reference to any particular trade or business, they are to be given that special meaning in the construction of any contract using them and pertaining to such trade or business, unless there is something showing that they are to be given their ordinary definitions, and while we have no particular authority now in mind we are sure the same rule applies in construing a statute, and that if a word there appears which has a meaning differing in any manner in law from common use, it shall be given its legal meaning, unless the contrary is indicated, or necessary.

And, as applied to this word "malpractice" this position appeals to common sense. The negligence of an attorney respecting the interests of his client does not differ in character from that of a physician with reference to his patient. Judge Cooley, Torts (1 ed.) 648; Cooley, Torts (2 ed.) 777, says:

"It is the misfortune of members of the learned professions that, in a very considerable proportion of all the cases in which their services are employed, their efforts must necessarily fall short of accomplishing the purpose desired, so that, if they do not disappoint expectations, they must at least fail to fulfill hopes. For this reason they are peculiarly liable to the charge of failure in the performance of professional duty, and it is important to know exactly what it is that the professional man promises when he engages his services. As the promise is not different

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in the case of the physician and surgeon from what it is in the case of the attorney, solicitor and proctor, one general rule may be given which will apply to all."

Any work of reference, or special text book on the subject, is authority that the right of action arises in precisely the same way against attorneys for negligence as against physicians, that it is for breach of the contract implied in the acceptance of the engagement that the professional man will employ that degree of skill ordinarily exercised and enjoyed by the profession generally, and the authors of forms of pleading cast the models for declarations against members of either profession on the same lines. Nash, Pl. & Prac. 233.

Counsel for plaintiff suggests that the right of action for negligence of one's attorney is an action upon an implied contract, with which we agree, and that it is therefore under the six year limitation. It would follow, then, that an action against one's physician for negligence, being of precisely the same nature, would, but for the amendment of 1894, be under the six year limitation also. Hence, we are forced to the conclusion, if the word "malpractice" does not apply to both kinds of action, that the legislature, in amending Sec. 4983, in 1894, undertook to discriminate in favor of the medical profession against that to which doubtless a great many of its members belonged. No reason is conceivable why a physician should live down liability for his blunders in one year while a lawyer should fear his luckless client's shadow for five years more. Another rule of construction is that it is presumed that the legislature did not intend an unusual thing.

We might suggest here that in his index to his work on attorneys, which counsel for plaintiff cites in another part of his brief, Mr. Weeks uses the word "malpractice," as the term applicable to negligence of attorneys, and that Judge Maxwell, in his code pleading, uses it exclusively with reference to attorneys.

Our conclusion is, that this word, whatever definition the dictionaries gave it, had a particular legal meaning in Ohio, when the section was amended, with which the legislature dealt, and that actions against attorneys were included in that amendment, wherefore the demurrer to the first and second causes of action should be sustained because the time limited within which they should have been brought has passed.

For reasons given in our discussion of the case of *Mitchell v. Long*, 20 Dec. 41, decided today, it seems profitable that this petition should also be considered upon the merits as challenged by the general demurrer, and we now proceed to discuss the first cause of action.

It is plain that, in stating a cause of action in negligence such as this, the pleader does not meet the situation unless he sets up, first, a relation between the parties, out of which a cause of action is possible

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to arise; second, such pertinent facts as may be in hand touching which a dereliction of duty by the defaulting party toward the party complaining may be seen to support a complaint of injury; third, negligence with reference to such facts of a character to suggest that injury may flow therefrom, and, fourth, an allegation of damage that may be seen to be the proximate result of the alleged negligence. Unless these four elements are all present in the pleading it is subject to a general demurrer. In this first cause of action we have the first element met by the showing that a jural relation existed between the parties, but have we any of the other essentials pleaded with the facts necessary to complete a case? We might modify the second essential, or the statement of it, by saying that if the facts upon which the predicate of negligence is laid do not of themselves suggest that a dereliction of duty with reference to them would be negligence, additional facts showing that peculiar relation of such matters to the case must be averred, and we may say that it is not sufficient to say simply that injury flowed from an alleged act of negligence unless the nature of the negligence is such as to necessarily involve an injury. If the probability that damage will flow therefrom is not apparent from a narration of the facts constituting negligence, additional facts must be pleaded showing in what manner and why the alleged damages are the proximate result thereof. In other words, unless the connection between the successive propositions and elements is apparent from the statement of them, the pleading must inform the court how one element flows into the other by additional averments. The *nexus* must either be obvious or specially pleaded.

Tested by this rule, how is it with this first cause of action? It informs the court that plaintiff's husband was a beneficiary under his father's will, as was his brother Parker; that Parker died testate, devising all his property to Harriet; that this fact was known to defendant who drew the will; that Harriet neglected to probate the will for more than three years, subjecting her to the forfeiture of her devise, and that this fact was known to defendant, and that he also knew of the statute of forfeiture; that after he had entered into the relation of attorney to plaintiff, defendant, presumably in his character of witness, assisted Harriet in the probate of this delayed will, and neglected to tell plaintiff about it; that thereafter defendant acted as counsel for plaintiff in an effort to get her the administration of her husband's estate but failed either to tell plaintiff of the statute of forfeiture in question or of the fact that Harriet was subject to it, and failed to use that fact before the probate court, wherefore the probate court refused her the preference as administratrix of her husband's estate; that, had this plight of Harriet's been made known to the probate court plaintiff

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would have received the coveted appointment; that all this was negligent and careless on defendant's part, and because of it, plaintiff suffered damages in the amount of more than seven hundred dollars as a result of her abortive effort to be given the administration, and entered into an ill-advised litigation which cost her over \$6,000 more.

It is not clear whether plaintiff relies very much, if at all, upon the fact that the defendant did not use his knowledge to prevent the probate of Parker's will, but if that is one of the grounds it adds nothing to this cause of action, for the section of forfeiture, Sec. 5943 Rev. Stat., has nothing to do with the probate of a will under its terms; facts which come under it and fully within its provisions cannot be used to defeat probate. We stated our position fully touching that question in the other case, *Mitchell v. Long*, 20 Dec. 41, and we are still satisfied with that construction of the function of this statute. Nor has plaintiff any right to complain that defendant did not give her information which he acquired because of his professional connection with the preparation of Parker's will. His duty to keep those facts to himself and to refrain from using them in any way adverse to the fruition of Parker's testamentary desires was superior to any duty he owed his later client, the plaintiff. Perhaps after Parker's will was probated, and the delay was a matter of record, defendant might with propriety have brought that fact and the statute to the attention of the probate court if he deemed these matters relevant to the contest over the administration, but we are unable to see what these facts had to do with that proceeding or how, had they come to the court's attention and had been vehemently urged upon it, they could have affected the result. The *nexus* here is surely wanting.

Examining the statute, we find that plaintiff, as widow of her deceased husband, had priority to the administration of his estate (Sec. 6005 Rev. Stat.) unless she came within the provisions of the third clause of the statute, which excepts from the preference one who is either incompetent, or evidently unsuitable for the discharge of the trust, or dilatory in pressing his claims. What would be unsuitability is perhaps defined by Sec. 6017, setting forth the reasons effectual for the removal of an administrator. It is the practice to read these statutes together for that purpose. The probate court must have found plaintiff to come within one of these categories, otherwise its refusal to appoint her would have been reversible error, and without some additional averment setting forth an explanation of how knowledge of the delay in question and of how the forfeiture statute would have affected plaintiff's status at this time toward the estate, we are in the dark to understand how these matters would have caused the probate judge to deem her a proper person for the administration rather than

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otherwise. Precisely the same difficulty arises with reference to the claim that these untoward results involved plaintiff in large expense for useless litigation. A good big lawsuit is not the obvious and natural sequence of a refusal of a probate court to appoint one an administrator, except, perhaps by way of appeal or error from his decision. It is obvious, from the character of this pleading that the unfortunate litigation which is alleged to have cost \$6,000 was collateral to the proceeding in the probate court, and this averment is not complete as a statement of proper damages without an explanation of how it happened that these damages flowed from the failure of defendant to tell the plaintiff and the probate court about the law of forfeiting devises and about Parker's will, and from the failure of defendant to have plaintiff appointed administrator. We are of the opinion, also, that the proximation of the damages alleged by way of the expenses of prosecuting the suit to be administratrix is not clear.

A demurrer admits all facts in the pleading attacked which are well pleaded, but the fact that there is room and provision for a demurrer in the practice presumes that a pleading may be filed which is defective in its statement of a cause of action, and a demurrer never operates to supply a cause of action where one did not exist before. We hold that this cause of action is obnoxious to a general demurrer.

The second and third causes of action are specially vulnerable to a general demurrer in that each attempts to incorporate the averments of the preceding causes by reference only. This practice has been repeatedly condemned by the Supreme Court, and demurrers on that ground are universally allowed. The Supreme Court in *Eureka Fire & Mar. Ins. Co. v. Baldwin*, 62 Ohio St. 368 [57 N. E. Rep. 57], one of four or five cases on the subject, says on page 384:

"The insurance companies in the second defense of their answer refer to the admissions and denials of their first defense, and make the same a part of the second as though fully pleaded at length therein. This is bad pleading, and such reference and taking of one cause of action in a petition, or ground of defense in an answer, to a former one, should be stricken out. Each cause of action or ground of defense should be separately and independently stated so as to enable the opposite party to take issue by demurrer or otherwise without being hampered by another cause of action or ground of defense."

Reading the averments of the former causes, referred to, into the second and third causes, we are of the opinion that each thereof is also subject to a general demurrer, in which behalf we would make the same criticisms which were offered to the first. It is not apparent from this pleading how plaintiff would have been damaged had a sale of the lands in question been made for cash, nor is it plain why the postponement

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of the confirmation of sale should have involved her in any expense. If these damages were the proximate results of these facts then the matters which brought them into such proximity should have been set out. As to each cause, also, there should have been a fuller statement of the manner in which the expenses complained of were necessarily incurred.

Demurrer sustained.

ESTOPPEL—LICENSE.

[Superior Court of Cincinnati, January, 1909.]

JOSEPHINE MUELLER ET AL. V. CINCINNATI TRACTION CO.

NAKED LICENSE IN REAL ESTATE IS REVOCABLE AND NONASSIGNABLE EVEN AGAINST
EQUITABLE ESTOPPEL.

A paper writing granting the use of certain land for a street railway loop and providing that if the loop is abandoned or the cars fail to stop as provided therein, the agreement shall cease and the company immediately vacate the premises, confers a license revocable and nonassignable against which the licensee can assert no rights thereunder by equitable estoppel or otherwise.

[Syllabus approved by the court.]

E. R. Donohue, for plaintiff.

G. H. Warrington, for defendant.

HOFFHEIMER, J.

The action is to recover possession of certain real estate and for damages for rents and profits.

Plaintiffs are devisees of Michael Hutzelman, party of the first part to the subjoined agreement, and defendant is the successor of the Cincinnati Street Railway Company, party of the second part.

The agreement referred to, is interposed as a third defense by the defendant, the Cincinnati Traction Company, to the action brought by plaintiffs and to this defense plaintiff demurs.

The agreement is as follows:

“This agreement made this seventh day of December, 1894, between Michael Hutzelman, party of the first part, and the Cincinnati Street Railway Company, party of the second part, Witnesseth:

“Whereas the party of the second part desires to make a loop at the corner of Baltimore avenue and Casper street, for its tracks, and the party of the first part is willing to allow the use of his ground, it is agreed that the party of the second part, may build its

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loop upon the ground of the party of the first part; and use said ground upon the following conditions:

"First. Before any other work shall be done, a fence shall be built, beginning on Baltimore avenue, one hundred feet N. W. from the intersection of Baltimore avenue and Casper street to a point on Casper street, one hundred feet north of said intersection, said fence to not include any further ground than though the fence were built at right angles to said streets. An outlet for water to be also given by the party of the second part.

"Second. The cars operated by said party of the second part shall make their stopping place in front of what is known as "Mueller's Garden" upon Baltimore avenue, northwest of Casper street.

"Third. If the loop is abandoned, or the cars are not stopped as above provided, this agreement shall cease, and the party of the second part shall immediately vacate said premises.

"Fourth. All expenses shall be paid by the party of the second part.

"In witness whereof, we have hereunto set our hands and seal the day and year first above written.

"MICHAEL HUTZELMAN,

"THE CINCINNATI ST. RY. CO.

"(SEAL.) By JOHN KILGOUR, *President.*"

The question raised by the demurrer is as to the nature of the interest raised by this agreement, and as to the right of Michael Hutzelman, or rather, since he has deceased, of those who stand in his shoes, namely, his devisees, to terminate the same.

These devisees contend that the paper writing did not create an easement, since the essential qualities of an easement are lacking, and upon this point there is no room for doubt. Washburn, Easements (4 ed.) 3; Coke's Littleton 122a.

And it is further insisted by plaintiffs that the right bestowed upon the Cincinnati Street Railway Company was either an easement in gross or a license, and therefore revocable and nonassignable.

Defendant on the other hand contends, in brief, that the right created by the agreement is something more than a mere naked license (always revocable); that if it is to be called a license, it is one which is executed and under which the licensee has entered upon the property and expended money upon the same, on the faith of the license, and that therefore it is irrevocable and assignable.

A great number of decisions in other states are cited in support of this contention, and reliance is also had on the early case of *Wilson v. Chalfant*, 15 Ohio 248 [45 Am. Dec. 574].

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That an irreconcilable conflict of opinion exists with reference to the question involved is at once apparent on reference to the authorities, and Mr. Freeman calls attention to the condition in a note to *Lawrence v. Springer*, 49 N. J. Eq. 289 [31 Am. St. Rep. 702-715], cited by our Supreme Court in the recent case of *Yeager v. Tunning*, 79 Ohio St. 121.

But if the proposition contended for by defendant is warranted by the law of other states, or seemed favored by *Wilson v. Chalfant*, *supra*, it is evidently no longer the law of this state.

This would seem to follow from *Rodefer v. Railway*, 72 Ohio St. 272 [74 N. E. Rep. 183; 70 L. R. A. 844], wherein the Supreme Court approves the principle laid down in *Wilkins v. Irvine*, 33 Ohio St. 138, and *Greenwood Lake & P. J. Ry. v. Railway*, 134 N. Y. 435 [31 N. E. Rep. 874], which cases stand opposed in principle to *Wilson v. Chalfant*.

While the supreme court did not expressly overrule *Wilson v. Chalfant* in *Rodefer v. Railway*, in a more recent utterance, *Yeager v. Tunning*, *supra*, it again criticizes *Wilson v. Chalfant*, and it says, this case "seems to have been based upon precedents that were in accord with the early English decisions, which as we have seen, (referring to *Wood v. Leadbitter*, 13 Mees. & Wels. 838) have been overruled."

But whatever may be the present status of *Wilson v. Chalfant*, I am of opinion that the paper writing conferred a license revocable and nonassignable, and that this defendant can assert no rights thereunder by equitable estoppel, or otherwise. *Rodefer v. Railway*, *supra*; *Jackson & Sharp Co. v. Railway*, 4 Del. Ch. 180, Syl. 2 and 3; *Lawrence v. Springer*, *supra*; *Yeager v. Tunning*, *supra*; *Spring Grove Cem. Proprs. v. Railway*, 31 O. C. C. 51.

Demurrer sustained.

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ATTACHMENT—JUDGMENTS—PUBLICATION.

[Hamilton Common Pleas, March 1, 1909.]

CITIZEN'S NAT. BANK OF WASHINGTON, PA., v. UNION CENT. L. INS. CO. ET AL.

1. MAKING NONRESIDENT PARTY DEFENDANT IN ATTACHMENT AND GARNISHEE NOT REQUIRED.

A nonresident judgment debtor, although a proper party, is not a necessary party to a proceeding against the garnishee of the funds of the judgment debtor, but having been made a party and filed an answer and cross petition, he will be permitted to remain in the case as a proper party.

2. METHODS OF ATTACKING JUDGMENTS.

A judgment rendered without notice or defense may be questioned, not only by proceedings to vacate the judgment under Secs. 5354 to 5365 Rev. Stat., but by a bill in equity attacking the judgment direct or cross petition in an action to enforce the judgment or right growing out of the judgment.

3. COLLATERAL ATTACK LIMITED TO QUESTIONING JURISDICTION TO MAKE FORMER JUDGMENT.

A judgment or order in a former case, cannot be collaterally attacked unless wholly void for want of jurisdiction of the person or subject-matter and the court is without power to render judgment.

4. COLLATERAL ATTACK JUSTIFIED.

Collateral attack of a judgment or order in a former case is justified only when such judgment or order is wholly void for want of jurisdiction in the court to render it. Accordingly, in an action upon a judgment, the defense may inquire even collaterally into the jurisdiction of the court rendering it, and show such fact by evidence *dehors* the record.

5. DIRECT AND COLLATERAL ATTACK DEFINED.

A direct attack on a judgment is one by which the judgment is directly assailed in some mode authorized by law; a collateral attack is an attempt to defeat the operation of a judgment in some proceeding where some new right derived through or from the judgment is involved.

6. DENIAL OF JURISDICTION TO RENDER FORMER JUDGMENT A DIRECT ATTACK.

A defense, denying jurisdiction of the court to render a former judgment, in an action to recover a judgment in which the only relief sought is a new recovery on it as a debt of record, and no rights of third parties have intervened or are involved, is a direct attack on the judgment; hence, such defense is not within the rule against collateral attack.

7. PREMATURE ISSUE OF ATTACHMENT.

Issue of orders of attachment against a nonresident before publication of notice constitutes an attachment before commencement of the action, not "at or after" the commencement as prescribed by Sec. 5531 Rev. Stat.; and, being unauthorized, such attachment has no force.

8. SUING NONRESIDENT BY INITIALS VOIDS JUDGMENT.

Suing a nonresident defendant by his initials, the petition and summons stating that his first name was unknown, is void without personal service as prescribed by Sec. 5118 Rev. Stat. in cases where plaintiff is ignorant of the name of defendant. Failure, also, to state in the verification of his petition that plaintiff could not discover defendant's true name, renders a judgment therein null and void.

9. JUDGMENT AGAINST NONRESIDENT INVALID FOR FAILURE TO FILE AFFIDAVIT OF UNKNOWN RESIDENCE OR NOT STATING IN PUBLICATION HIS RESIDENCE.

Failure of plaintiff in an action against a nonresident defendant if his residence were unknown to file an affidavit before the hearing and judgment setting forth that his residence was unknown and could not with

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reasonable diligence be ascertained as required by Sec. 5045 Rev. Stat.; or failing to state in the publication the residence of defendant, uncontradicted evidence showing that his residence was known, and to see that the clerk mailed copies thereof to defendant at his known residence as prescribed by said Sec. 5045, render a judgment against such non-resident invalid.

10. PERSONAL JUDGMENT AGAINST NONRESIDENT INVALID UNLESS PROPERTY IS ATTACHED.

An attachment proceeding is one *in rem*, giving a court no jurisdiction to render a personal judgment against a nonresident debtor where no property of his is brought within the control of the court.

[Syllabus approved by the court.]

Jones & James, for plaintiff:

No time is fixed by statute within which service by publication must be made. *Bacher v. Shawhan*, 41 Ohio St. 271.

The entry approving service by publication must be taken as conclusive in this case. *Winemiller v. Laughlin*, 51 Ohio St. 421 [38 N. E. Rep. 111]; *Cincinnati, S. & C. Ry. v. Belle Centre*, 48 Ohio St. 273 [27 N. E. Rep. 464]; *Irvin v. Smith*, 17 Ohio 226; *Buchanan v. Roy*, 2 Ohio St. 251; *Fowler v. Whiteman*, 2 Ohio St. 270; *Richards v. Skiff*, 8 Ohio St. 586; *Callen v. Ellison*, 13 Ohio St. 446 [82 Am. Dec. 448]; *Hammond v. Davenport*, 16 Ohio St. 177; *Rhodes v. Gunn*, 35 Ohio St. 387.

Not a fictitious name. *Donaldson v. Donaldson*, 31 Bull. 102; *State v. Miller*, 7 Circ. Dec. 552 (13 R. 67); *State v. Foster*, 38 Ohio St. 599; *State v. Telephone Co.* 36 Ohio St. 296 [38 Am. Rep. 583]; *Slocum v. McBride*, 17 Ohio 607; *Hare v. Harrington*, Wri. 290.

Necessity of showing defense. 16 Am. & Eng. Enc. Law 386; *Secor v. Woodward*, 8 Ala. 500; *Dunklin v. Wilson*, 64 Ala. 162; *State v. Hill*, 50 Ark. 458 [8 S. W. Rep. 401]; Freeman, Judgments (4 ed.) 876, Art. 498; *Jeffery v. Fitch*, 46 Conn. 601; *Budd v. Gamble*, 13 Fla. 265; *Combs v. Oil Co.* 58 Ill. App. 123; *Gerrish v. Hunt*, 66 Iowa 682 [24 N. W. Rep. 274]; *Taylor v. Lewis*, 25 Ky. (2 Mar. J. J.) 400; *Fowler v. Lee*, 10 Gill & J. (Md.) 358; *Stewart v. Brooks*, 62 Miss. 492; *Newman v. Taylor*, 69 Miss. 670 [13 So. Rep. 831]; *Herbert v. Herbert*, 49 N. J. Eq. 70 [22 Atl. Rep. 789]; *Gifford v. Morrison*, 37 Ohio St. 502 [41 Am. Rep. 537].

He who seeks equity, must do equity. *Hauswirth v. Sullivan*, 6 Mont. 203; *Parsons v. Nutting*, 45 Iowa 404; *Jeffery v. Fitch*, 46 Conn. 601.

Maxwell & Ramsey, for the Union Cent. Life Ins. Co..

J. W. O'Harra, for W. F. Wright.

ORMAN, J.

This cause is submitted to the court on the pleadings and the evidence, the parties having waived a jury. At the close of the evidence

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the case was ably argued by counsel for plaintiff and defendants, and since that argument, counsel for both the plaintiff and W. F. Wright, defendant, have filed exhaustive and well considered briefs in which the issues have been splendidly presented and supported by numerous authorities.

The amended petition sets out that the plaintiff, a corporation under the banking laws of the United States, recovered a judgment against the defendant, W. F. Wright, on January 5, 1904, in the court of common pleas of Washington county, Pennsylvania, in the sum of \$1,343.17 and that said Wright was personally served in said action as "W. F. Wright"; that the cause of action arose on a promissory note of said Wright, executed by him in the name of "W. F. Wright," in favor of plaintiff; that on March 9, 1904, plaintiff commenced an action in the court of common pleas of Hamilton county against said "W. F. Wright" on said foreign judgment as provided by the laws of Ohio and the act of congress, which cause is numbered on the docket of this court 128420; that summons was issued against defendant Wright and the same was duly returned, "not found"; that plaintiff duly filed with said petition and as a part thereof an affidavit in attachment and garnishment in due form and in conformity with all the requirements of Sec. 5522 and 5530 Rev. Stat. setting forth that plaintiff's claim is a foreign judgment, that it is just and that plaintiff ought to recover the amount claimed; that W. F. Wright is a nonresident of Ohio and that the Union Central Life Insurance Co., a corporation under the laws of Ohio, has properties, moneys, credits, etc., in its possession, the property of said W. F. Wright; that on said March 9, 1904, an order of attachment and garnishment issued and was served on the defendant, the Union Central Life Insurance Co., by delivering the same to J. R. Clark, Treasurer; that on March 24, 1904, the garnishee answered stating that there was no property of W. F. Wright in its possession or under its control; that on June 25, 1904, plaintiff filed another affidavit in attachment setting up the same facts set forth in its first affidavit in attachment and on said second affidavit, a second order of attachment and garnishment was issued and the same served on the defendant, the Union Central Life Insurance Co., by leaving a copy with E. P. Marshall, secretary, but that said garnishee has never answered said second order of garnishment and is still in default for answer thereto, nor did it answer interrogatories filed with said second affidavit in attachment; that on March 28, 1904, plaintiff duly filed its affidavit for service by publication of said W. F. Wright stating therein that service could not be made in this state on said Wright, and that this was one of the cases mentioned in Sec. 5045 Rev. Stat.; that on March 15, 1905, plaintiff commenced publication of the legal notice required by law for six

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consecutive weeks and on January 23, 1906, filed proof of publication of said notice and that this court made an order finding said publication in all respects regular and according to law and the former order of the court; that on January 4, 1906, plaintiff filed its motion for an order to require the garnishee to pay the amount of plaintiff's claim into court, and the court granted said motion and made a finding that the defendant, the Union Central Life Insurance Co., had in its possession money belonging to said W. F. Wright more than sufficient to satisfy plaintiff's claim and ordered the said garnishee within ten days from January 23, 1906, to pay into the court the sum of \$1,343.17 with interest and costs; that on January 27, 1906, a judgment by default was entered against Wright in favor of plaintiff for \$1,504.35, the claim and interest in which judgment the court found that Wright had been duly served with summons by publication and was in default and that the allegations of the petition were true; that said garnishee was served with a certified copy of said order to pay into court said money and has failed to comply therewith.

Plaintiff further avers that the answer of the Union Central Life Insurance Co., garnishee, to the first order of attachment and garnishment was false, and that in fact said garnishee at the time of service of the order on it was indebted to said W. F. Wright in a large sum of money far in excess of the plaintiff's claim against said Wright; that between the months of March, 1904, and January, 1906, said garnishee paid said Wright the sum of \$4,000 for services rendered by said Wright to said garnishee prior to March, 1904, and that in June, 1905, said garnishee paid said Wright \$1,200, and that said defendant, the Union Central Life Insurance Co. had in its possession at all times more than sufficient of defendant Wright's money to satisfy plaintiff's claim; and plaintiff concludes with a prayer for judgment against the Union Central Life Insurance Co. and W. F. Wright, in the sum of \$1,504.35, with interest and costs.

This is manifestly intended to be an action against the garnishee under Sec. 5551 Rev. Stat. for failure to answer, failure to make satisfactory disclosure, or failure to comply with the order of the court to pay the money into court; and it would seem that in such an action the judgment debtor, Wright, is not a necessary party, although he may be a proper party. However, he has been made a party, and both he and the garnishee, the Union Central Life Insurance Co., have filed answers, and Wright has also filed a cross petition against the plaintiff alleging that the judgment recovered against him in this court in the former action No. 128420 is null and void, and asks that it be set aside and held for naught and that plaintiff be enjoined from proceeding further in any way to collect or enforce said judgment. In his answer, the aver-

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ments whereof are all adopted in his cross petition, defendant, Wright, alleges that the judgment and orders in said cause No. 128420 on the docket of this court are null and void, because he, Wright, was never served with summons or other process in said case, and never entered his appearance therein and that the court never acquired jurisdiction therein over his person or the subject-matter of the action other than by said attempted proceedings in attachment and garnishment; that the full name of said defendant was not set out in the petition in said cause No. 128420 nor in any of the proceedings therein; that the verification of the petition failed to state that the true name of said defendant could not be discovered as required by Sec. 5118 Rev. Stat.; that no summons was ever served on said defendant personally or otherwise; and that there was no affidavit filed in said cause No. 128420 at any time before hearing stating that the residence of said defendant, Wright, was unknown and could not with reasonable diligence be ascertained; that the only notice by publication given in said cause described said defendant as "W. F. Wright (first name unknown) whose place of residence is unknown;" that no copy of said notice by publication was ever sent to said defendant; that as a matter of fact the residence of said defendant was well known to the plaintiff to be at Buffalo, New York, and that all moneys due said defendant from his codefendant, the Union Central Life Insurance Co., at all times set forth in the former case, No. 128420, were due and payable in the city of Buffalo, New York.

The answer of the Union Central Life Insurance Co. sets up that the judgment and order of this court in the former case, No. 128420, were null and void for the reason that the affidavit for constructive service alleged the residence of the defendant, Wright, to be unknown whereas it was well known; and further that any moneys due Wright from it were due and payable in Buffalo, New York. By reply the plaintiff denies that the judgments and orders in the former case No. 128420 are null and void and denies that the moneys due and payable to defendant Wright were due and payable in the city of Buffalo, New York.

The record of the former case, No. 128420, was offered in evidence on the trial of the cause, and the defendant, W. F. Wright, testified, and he is uncontradicted, that at the time of the bringing of the former action in this court and for a long time prior thereto, the officers, the president and cashier of the plaintiff company, well knew where his office and residence were in the city of Buffalo, and that the president of the plaintiff company, who verified the petition and made the first affidavit in attachment, had been in his office and his residence at Buffalo and had also corresponded with Wright for sometime prior to

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the filing of the petition in the former case, and that there was no manner of mistake about it, but that the said president of plaintiff company well knew said Wright's residence before and at the time the petition in the former case was filed.

It is contended by both defendants that neither of them can be held in this action because the judgment and attachment in the former case is null and void on the ground that the court did not have jurisdiction to make the order in attachment on the Union Central Life Insurance Co. to pay the money into court, nor did the court have jurisdiction to render a personal judgment against the defendant, Wright, for the reasons set forth in his answer.

It is admitted by plaintiff that if the judgment and order on the garnishee in the former case are null and void the judgment in the case at bar must be for the defendants; but it is urged first, that Wright is not a necessary or proper party and, second, that the judgment and order on the garnishee, in the former case cannot be questioned in this action, because it is a collateral attack on a judgment and order which is binding and conclusive on all parties, all courts, at all times, and in all places.

As to the first objection of the plaintiff it is sufficient to say that Wright was made party defendant by the plaintiff and although the court is of the opinion that he was not a necessary party, nevertheless he was a proper party in this action where it is sought to sequester his property and compel a third party to respond to a suit which grows out of Wright's relations as debtor of the plaintiff; and although plaintiff at the opening of the trial asked leave of court to dismiss Wright from the action on the ground that he was not a necessary party, the court refused to permit this to be done after Wright had filed an answer and cross petition herein asking that the judgment in the former case be set aside and held for naught, and was present in court in person and by counsel insisting on his right to maintain his cause of action set up in his cross petition. The court was then, and still is, of the opinion that inasmuch as Wright might have brought an independent suit to attack the judgment and ask to have it set aside, he should be allowed to set up the same equitable cause of action by way of cross petition herein, if for no other reason than that a multiplicity of suits would thereby be avoided. Furthermore, under our code, a defendant is permitted to set up in his answer as many grounds of defense, counterclaim and set-off, as he may have, whether they be legal, or equitable or both. Sections 5066 and 5067 Rev. Stat.. Not only could the defendant, Wright, by cross petition attack the judgment and order of the court in the former case, but in the opinion of the court the other defendant, the Union Central Life Insurance Co., could have done likewise; and if

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the court be correct in this conclusion, no substantial injury has been done to the plaintiff by refusing to permit defendant Wright to be dismissed from the action or refusing to dismiss his cross petition. The Supreme Court of this state in the case of *Kingsborough v. Tousley*, 56 Ohio St. 450 [47 N. E. Rep. 541], in considering the right of the defendant to set up in his answer or by way of cross petition any state of facts which may have the effect of defeating or nullifying the judgment in a former case, uses this language on pages 460, 461:

"In such a case, under the practice which prevailed before the adoption of the civil code, a bill in equity would lie for relief against the judgment; or, similar relief might have been obtained by cross bill in a suit in the nature of a creditor's bill to reach equitable interests of the judgment debtor, or other proceeding in chancery to enforce the judgment." (Citing several authorities.) "And where the judgment was obtained without jurisdiction of the party, he was not required to tender a valid defense to the cause of action on which the judgment was rendered, in order to obtain relief against it." The court here cites copiously from the case of *Ridgeway v. Bank*, 11 Humph. (Tenn.) 523 "which was a suit to enjoin the collection of a judgment" (as in the case at bar) "the record of which showed that the defendant therein was duly served with process and the record was otherwise regular on its face. The bill to enjoin, alleged that the complainant was not summoned, and the judgment was rendered without notice to him."

The court then proceeds on page 461:

"A judgment thus obtained, without notice or defense, and without a day in court to make a defense, is an injury to the rights of the party for which he should not be without a remedy."

And on page 462, the court says:

"Nor is it material in such case to inquire whether the defendant could have made a valid defense, if he had been summoned. The injury of which he complains is, that a judgment was rendered against him without notice and without defense. * * * The equitable remedy was not taken away by those statutory provisions authorizing an application to the court in which the judgment was rendered, to vacate or modify the judgment; nor was it abrogated by any provision of the code. * * * The code authorizes a defendant to plead the equitable as well as the legal defenses, he may have to an action; and whatever is sufficient in equity to defeat a judgment, or its enforcement, is a valid equitable defense to an action brought upon it."

It would seem, therefore, on the authority of this case, *Kingsborough v. Tousley*, *supra*, that the validity of a judgment rendered without notice or defense may be questioned not only by proceedings under the statute to vacate the judgment, Secs. 5354 to 5365, inclusive, but by a

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bill in equity attacking the judgment direct or by cross bill or cross petition in an action to enforce the judgment or a right growing out of the judgment as in the case at bar.

It is urged that the method employed in the case at bar is a collateral attack on the judgment in the former case and that the only method of attacking the former judgment is by proceedings under Secs. 5354 to 5360 Rev. Stat., inclusive; but it seems to the court that the case above cited is conclusive on the question that those sections of the code do not provide the only remedy which may be pursued, as has been pointed out above. Indeed it was urged, in that case, that the remedy to be pursued was that afforded by the above cited sections of the statutes; and it was in answer to this claim that the court pointed out that these sections were not exclusive.

What, then, is a direct and what is a collateral attack on a judgment? In order to justify a collateral attack on a judgment or order in a former case, the judgment or order must be wholly void and a nullity, because the court rendering it had no jurisdiction of the person or the subject-matter and was without power to render the judgment. Tested by this principle, the judgment and order in the former case, No. 128420, may be called in question if they are void and not merely voidable, even if it be conceded that the present action is a collateral attack. A void judgment or order may be questioned at any time and place by any court or person. No person is bound to respect such a judgment or order. It is a mere nullity—no more than a blank piece of paper.

Now, some confusion has arisen over the decisions of our courts as to what is a direct and what is a collateral attack. In *Kingsborough v. Tousley*, *supra*, Judge Williams fully considers this question and shows clearly the distinction between the two kinds of attack. On page 455 he says:

“Two seemingly conflicting principles have given rise, in their application, to differences of opinion concerning the effect of judicial records. The one accords to judgments of courts having apparent jurisdiction of the subject-matter and parties in an action, conclusive verity as to all matters purporting to have been adjudicated, and precludes a re-examination of them in subsequent litigation between the parties and their privies” (This states the doctrine of *stare decisis*; the court then proceeds) “and the other, asserts the right of every person to his day in court, and an opportunity to be heard, before he can be condemned in his person or property. In accordance with the former, the rule generally prevails, and is nowhere more firmly established than in this state that when it does not otherwise affirmatively appear *from the record*, it will be conclusively presumed, whenever a domestic judg-

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ment of a court of general jurisdiction is drawn in question in any collateral way, that the court regularly acquired and lawfully exercised its jurisdiction over the parties; * * * and neither the presumption, nor the recitals of the record, can be contradicted in such proceeding, by extrinsic evidence. When the record discloses a want of jurisdiction the judgment is, of course, void everywhere, and for every purpose."

The court then says, that, "on the other hand, the other principle referred to" (that a party is entitled to notice and his day in court) "is sometimes employed to justify the broad statement that in all cases, even when the judgment is collaterally assailed, the jurisdiction of the court rendering it may be inquired into, and a want of service, or the absence of other jurisdictional facts be shown by parol, in opposition to the record. Most of the cases in which the rule is so stated * * * are those in which the question *arose upon defenses to suits on judgments*, and may, perhaps on that ground, be brought in harmony with the rule usually adopted of permitting such inquiry and proof when the judgment is directly attacked."

Now in the case at bar the plaintiff is seeking to enforce the former judgment and order on the garnishee, or a right which he claims arises out of the judgment and order to pay in the money, and if the Supreme Court is correct in saying that in actions on judgments the defense may inquire even collaterally into the jurisdiction of the court to render the former judgment, the defendants in the case at bar are well within their rights when they attack the validity of the judgment and order on the garnishee in case No. 128420, in their answer as a defense to the plaintiff's right to recover, even though it be admitted for the sake of the argument that such an attack is collateral. Such is the understanding of the court of the conclusion of our Supreme Court announced above.

The court further says, on page 456: "The authorities are substantially uniform to the effect that when the judgment is directly attacked for want of jurisdiction, such want of service and jurisdiction may be shown, though it be in contradiction of the record." And speaking of what constitutes a direct attack the court says, that "it includes proceedings in error, motions to vacate or modify the judgment, and that in some cases it may be made by original action, as was formerly done by bill in chancery to correct or set aside the judgment."

In the case of *Spier v. Corll*, 33 Ohio St. 236, the court lays down the broad rule, that "the jurisdiction of a court or tribunal entering a judgment in any particular case may always be inquired into, when such judgment is made the foundation of an action either in a court of the state in which it was rendered, or of any other state."

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In the case of *Clark v. Little*, 41 Iowa 497, it is held that where, in a suit on a domestic judgment, the defendant denies the jurisdiction of the court rendering it, for want of notice or service of process (just as in the case at bar) his defense is not a collateral but a direct attack upon the judgment and it is permissible for him to show that service was not made upon him.

A direct attack on a judgment has been defined to be one by which the judgment is *directly assailed* in some mode authorized by law; while a collateral attack is *an attempt to defeat the operation of a judgment* in some proceeding where some new right derived through or from the judgment, is involved. In the case at bar it is sought to recover a judgment against the defendants, and the foundation of the claim is the former judgment of this court.

This action is founded upon a judgment in which the only relief sought is a new recovery on it, as a debt of record, and no rights of third parties have intervened or are involved; in such a case the court is of the opinion that a defense which sets up that the former judgment was rendered without jurisdiction, may be regarded as a direct attack on the judgment and not within the rule against collateral attacks.

It also appears from the answer of the defendant, Wright, that he was a resident of the state of New York at the time the former judgment in case No. 128420 was rendered, and that he was not served with process, nor his appearance entered, and on such a state of facts the Supreme Court of the United States in the case of *Pennoyer v. Neff*, 95 U. S. 714 [24 L. Ed. 565], held that a judgment against the defendant may be questioned and its enforcement resisted on the ground that the proceedings of a court of justice to determine personal rights and obligations of one over whom it has no jurisdiction, is not due process of law. See also, *Freeman v. Alderson*, 119 U. S. 185 [7 Sup. Ct. Rep. 165; 30 L. Ed. 372]; *Needham v. Thayer*, 147 Mass. 536 [18 N. E. Rep. 429].

The court is therefore of the opinion that even if the attack made upon the former judgment and order on the garnishee by the answers and the cross petition are to be considered as collateral attacks, the defendants have the right in this action to question the validity of said judgment and order in the manner adopted in the answers and cross petition, and that such right is guaranteed and preserved to him under Art. 14, Sec. I, U. S. Const., which prohibits any state, and necessarily any state court, from depriving any person of life, liberty or property, without due process of law.

Counsel for plaintiff have cited the court to the case of *Winemiller v. Laughlin*, 51 Ohio St. 421 [38 N. E. Rep. 111], as a case in which the facts are such as in the case at bar, and wherein the court held that such a defense as is interposed in the case at bar was a collateral at-

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tack and not permissible. A careful consideration of the facts in that case, having in mind the principles laid down in the cases above cited, will make it apparent that that case does not come within the rule of a direct attack nor a collateral attack in a defense where the action is on a former judgment. Furthermore, the court had jurisdiction of the subject-matter in the former case in which the judgment was rendered, being a foreclosure of a mortgage on real estate within the county where the former decree was entered. Besides, the plaintiff in that case did not make a direct attack on the former judgment or decree but sought to avoid the effects of the judgment by ignoring it, and asking a foreclosure of a second mortgage on the lands sold under the decree in the former case.

Counsel for plaintiff also claim, that the case of *Railroad Co. v. Belle Centre*, 48 Ohio St. 273 [27 N. E. Rep. 464], is a case similar to the one at bar and that our Supreme Court therein called an attack similar to the one in the case at bar a collateral attack. In that case the Supreme Court found that the record in the probate court where the former judgment was rendered showed that the court acquired jurisdiction of the person of the railroad company by its filing and arguing a motion to dismiss the proceeding in the probate court on the ground that the probate court had no jurisdiction of the subject-matter. On page 292 the court says:

“This effected the appearance and gave the court jurisdiction of the plaintiff in error.”

It was further claimed that the probate court had no jurisdiction of the subject-matter, property appropriated by the village belonging to the railroad company. The Supreme Court held that the probate court in the former case had jurisdiction of the property or subject-matter and having acquired jurisdiction of the person by the filing and arguing of said motion the judgment and decree of the probate court in the former case was final and conclusive and not subject to an attack by an injunction to restrain the village of Belle Centre from taking possession of the property awarded to it by the probate court in the former action to appropriate the same in that court. This action it will be seen was not a direct attack on the judgment of the probate court either by a new suit to declare it a nullity or by answer and cross petition setting up a defense to an action on the former judgment. The railroad company ignored the former decree of the probate court, and sought to avoid the effect and operation of the decree by restraining the village of Belle Centre from taking possession of the property which it claimed by virtue of the decree of the probate court. But even in this case which is clearly a collateral attack, the court would have held with the railroad company and restrained the village of Belle Centre from taking

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possession of the property if it had found that the probate court had not jurisdiction of the person or the property of the railroad company; but having found that the probate court had jurisdiction of both, it necessarily followed that the title and right of possession of the village could not be questioned in an injunction suit, but only by proceedings in error or appeal, or by direct attack under Secs. 5354 to 5365 Rev. Stat.

The court in *Railroad Co. v. Belle Centre*, *supra*, on page 289 uses this language:

"And, it is not doubted, that unless the probate court had jurisdiction over both the property and the parties, its judgment is void, and may be collaterally assailed."

An examination of the other cases cited by counsel for plaintiff will disclose that in no case in which the action was to recover on the former judgment or to recover a judgment founded upon a former judgment was the defendant precluded even in a collateral attack from showing by evidence *dehors* the record that the court in the former action acquired no jurisdiction to render the judgment because there was no notice, and no opportunity for a defense, and no entry of appearance or jurisdiction of the defendant's property. The court has examined all the cases cited by counsel for plaintiff and finds nothing in them which shakes the doctrine laid down in *Kingsborough v. Tousley*, *supra*.

The first inquiry then is, Did the court of common pleas in case No. 128420 have jurisdiction to render the judgment against W. F. Wright for \$1,504.35 and did it acquire jurisdiction to order the defendant, the Union Central Life Insurance Co., to pay the money of said Wright into court?

The record of case No. 128420 discloses that the two attachments were issued long before any publication of notice was made; in fact, nine months elapsed after the second affidavit in attachment was filed and attachment issued, before the first publication was made.

Now Sec. 5521 Rev. Stat. provides among other things that the plaintiff may *at or after the commencement of a civil action* have an attachment against the property of the defendant, etc. There is no provision in the statute for an attachment *before the commencement of an action*. Section 5032 provides, that a civil action must be commenced by filing in the office of the clerk of the proper court, a petition, and causing a summons to be issued thereon. It has been held that where the defendant is a nonresident of the state and cannot be served except by publication it is "an idle ceremony" to issue a summons on the filing of a petition. *Smith v. Whittlesey*, 10 Circ. Dec. 377 (19 R. 412); *Bannister v. Carroll*, 43 Kan. 64 [22 Pac. Rep. 1012]; *Carper v. Richards*, 13 Ohio St. 219.

The action is begun in a case where it is necessary to publish for

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the defendant (as in the case at bar) at the date of the first publication, if the publication be regularly made. Secs. 4987-4988 Rev. Stat. Now it would appear that no attachment was issued *at* or *after* the date of the first publication of notice for service, March 15, 1905, but that both attachments were issued *before the commencement* of the action, and were therefore unauthorized and null and void. The attachments were of no force and effect and the Union Central Life Insurance Co. was not required to answer the garnishments or take any notice of them.

This identical question was decided by the Supreme Court of Kansas whose code is a copy of our own. See *Jones v. Warnick*, 49 Kan. 63 [30 Pac. Rep. 115], where it is held in the syllabus and in the opinion:

"In an action against nonresidents in which an order of attachment is issued at the time of the filing of the petition and their real estate attached, an affidavit for service by publication must be filed and the first publication made within sixty days from the filing of the petition and other necessary papers. If the affidavit for constructive service and the first publication thereof is not made for more than thirteen months after filing the petition and the issue levy and return of the order of attachment, *an action has not* been commenced and an order of attachment cannot be issued and served."

An examination of the Kansas civil code will disclose that the sections relating to the commencement of actions, the issuing of summons and attachments, Secs. 4987-4988, 5032 and 5521 Ohio Rev. Stat., are identically the same as the sections of the Kansas code covering the same subjects. See also, *Kincaid v. Frog*, 49 Kan. 766 [31 Pac. Rep. 704].

It is urged by counsel for plaintiff that the case of *Bacher v. Shawhan*, 41 Ohio St. 271, construes our Secs. 4987 and 4988 Rev. Stat. otherwise. All that was held in that case was, that upon failure to serve and complete publication for more than sixty days, or for eight months after the return of summons it is error to dismiss the action for alleged want of jurisdiction by reason of such delay. Of course cause No. 128420 cannot be dismissed because publication and service were not made within sixty days from the filing of the petition, but as bearing on the subject of when an attachment may issue, it is not commenced until the notice is published, in case of a nonresident. While it is true that the provisions of Secs. 4987 and 4988 Rev. Stat. have reference to the limitations of time of bringing actions, and when the statute of limitations shall begin to run, nevertheless it would seem that for the purpose of determining when an action is commenced these are the only sections shedding light upon the question.

It is further urged by counsel for defendant, W. F. Wright, that

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because Wright was sued by his initials the petition stating that his first name was unknown and the summons contained the same statement in the former case No. 128420. and because of the further fact that there was no personal service upon him as required by Sec. 5118 Rev. Stat. in cases when the plaintiff is ignorant of the name of defendant, that therefore the former judgment against Wright is null and void. The plaintiff fails, also, in the verification of his petition in case No. 128420 to state that he could not discover defendant Wright's true name. The case of *Uihlein v. Gladieux*, 74 Ohio St. 232 [78 N. E. Rep. 363], supports this claim in the clearest and most unmistakable terms and holds in a similar case to the one at bar that there is no valid petition and no valid judgment. Upon the authority of this case the court is compelled to hold on this ground also, that the judgment against Wright in the former case No. 128420 is null and void.

The court is further of the opinion that the evidence discloses that plaintiff well knew the residence of the defendant Wright when the former action was brought in this court, and that inasmuch as no affidavit was filed in said cause before the hearing and the rendition of the judgment, setting forth that the defendant Wright's residence was unknown and could not, with reasonable diligence, be ascertained, as required by Sec. 5045 Rev. Stat., the judgment rendered against said Wright is null and void and of no force and effect. The judgment is null and void for the further reason that it was the duty of the plaintiff under Sec. 5045 to state in the publication the residence of the defendant Wright, which the uncontradicted evidence shows was known to it, and immediately after the first publication, see that the clerk of the court of common pleas should mail copies of the publication to defendant Wright at his known residence in Buffalo, New York, and the clerk could thereupon make an entry thereof on the appearance docket. Nothing of this kind was done, and it would seem that if an effort had been made to prevent defendant Wright in the former action from learning that a suit had been filed against him in this court, the effort could not have met with greater success than in the case before the court. It was the duty of the plaintiff's president to give his counsel in this city such information of defendant Wright's residence as he possessed, in order that the statutes of our state might be complied with and the defendant Wright have notice and his day in court.

Furthermore the judgment in the former case on the face of the record discloses that it is void for the reason that it was purely a proceeding *in rem*.

The court acquired no jurisdiction to render a personal judgment against Wright, a nonresident of this state, because no property of the defendant Wright was brought within the control of the

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court by the attachment or garnishment; and if there had been any property brought within the control of the court the jurisdiction of the court in that event would have been exhausted by the appropriation of the property on the demand of the plaintiff. No judgment of any kind could have been entered in the former case until some property had been brought into court by the attachment or garnishment. *Oil Well Supply Co. v. Koen*, 64 Ohio St. 422 [60 N. E. Rep. 603]; *Cleveland Co-Operative Stove Co. v. Mehling*, 11 Circ. Dec. 400 (21 R. 60); *Davis v. Lewis*, 8 Circ. Dec. 772 (16 R. 138).

The judgment of the court is that the petition be dismissed and that the defendants go hence without day and recover their costs.

DEEDS—EQUITY—PRIORITIES—RES ADJUDICATA.

[Franklin Common Pleas, April 19, 1909.]

MARGARET FLEMING v. JOHN G. MCGUFFEY ET AL.

1. JUDGMENT AGAINST ADMINISTRATOR AS SUCH NOT RES. ADJUDICATA AS AGAINST CLAIMS OF CREDITORS NOT PARTIES.

A judgment restoring a destroyed deed in an action brought by a widow against the heirs and administrator of her deceased husband under Sec. 4134 Rev. Stat., to which his creditors were not made parties or permitted to defend, is not *res adjudicata* of an action in the nature of a creditor's bill instituted by judgment creditors of the estate under a prior judgment; merely making the administrator a party and his appearance as such in the action cannot make the matter pleaded operate against such creditors not made parties.

2. MARRIED WOMAN ESTOPPED TO DENY HER HUSBAND'S TITLE TO HER LAND IN HIS NAME AFTER INJURY TO INNOCENT PARTIES RELYING ON HIS OWNERSHIP THEREOF.

A married woman, in consideration of money loaned her husband with which he purchased land in his own name, a deed to which he executed and delivered to her, possession of which without recording it she retained several years until destroyed by him and in lieu thereof accepted a promise of a devise of the land, and after his death taking it under his will, is estopped to deny his title to the land upon default of a trustee upon whose bond he was accepted as surety by reason of her permitting him to hold himself as the owner of such land.

3. DATE OF DECREE OF CIRCUIT COURT UPON APPEAL FIXES DATE FOR DETERMINING PRIORITIES.

The date of a final decree of the circuit court upon appeal from a decree of the common pleas in a proceeding to restore a destroyed deed under Sec. 4134 Rev. Stat., rather than that of the common pleas, governs in determining equitable priorities, especially as to judgment creditors in a prior action having a substantial interest in the *res* but not made parties to the restoration proceedings.

4. DOCTRINE OF PRIORITIES BETWEEN JUDGMENT LIENS AND UNRECORDED CONVEYANCES NOT APPLICABLE WHERE ASSERTION OF LATTER IS ESTOPPED.

The doctrine that a judgment lien is not entitled to priority over an unrecorded conveyance where the judgment creditor learns of such conveyance before his judgment is taken, is not applicable where the unrecorded conveyance is not discovered until after judgment, especially since the equities arising from the conduct of the holder of the conveyance estop assertion of its existence.

[Syllabus approved by the court.]

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- DEMURRER.

M. E. Thrailkill and W. T. S. O'Hara, for plaintiff.

DeWitt & Hubbard, for defendant, Mary E. Haviland.

J. J. Stoddart and W. K. Williams, for cross petitioner, the Tribune Fresh Air Fund Society.

KINKEAD, J.

The question is presented upon demurrer of the Tribune Fresh Air Fund Society to the amended answer of Mary E. Haviland to the second amended answer and cross petition of the Tribune Fresh Air Fund Society; and upon the demurrer of Mary E. Haviland to the reply of plaintiff.

The action of plaintiff and cross petitioners is a creditor's bill against bondsmen of an executor.

A previous action was brought by these judgment creditors against the bondsmen of Ripley C. Hoffman, executor, to which Mary E. Haviland, as administratrix was defendant.

This was determined upon demurrer to the petition in the Supreme Court April 22, 1902 (*Hoffman v. Fleming*, 66 Ohio St. 143 [64 N. E. Rep. 63]). It then proceeded to judgment, the plaintiff and the demurring cross petitioner in this action obtaining judgments as herein-after appearing.

This action was thereupon instituted December 29, 1904.

Mary E. Haviland commenced an action May 31, 1902, to restore a destroyed deed made to her by her husband in 1882, the deed being destroyed in 1890 or 1891. A decree was rendered in her favor in that case. These judgment creditors were not parties to her action. The defendants were the heirs and administrator of Michael Haviland, deceased.

The question upon demurrer is, whether Mrs. Haviland's action is *res adjudicata* and a valid defense so far as the judgment goes to the Michael Haviland estate.

The general doctrine is that to make out the defense of *res adjudicata*, the subject-matter of the judgment set up must be the same, and it must be between the same parties or their privies, and the precise question must have been determined. *Mauldin v. City Council*, 53 S. C. 285 [31 S. E. Rep. 252; 43 L. R. A. 101; 69 Am. St. Rep. 855].

The plea can never be urged against one who is not a party to the litigation, nor against one not represented by another who stands in a relation of privity.

The claim is made here that the matter pleaded operates against the judgment creditors because they were represented by the administrator of the Michael Haviland estate.

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It is true that the administrator of the estate appeared in the case, brought by Mary Haviland, and that he alleged that there was a probable liability on the bond as against the estate.

Such a pleading by the administrator amounted to nothing so far as the judgment creditors are concerned. It would have been unusual for the administrator to have even allowed such unliquidated claims as were presented by these judgment creditors as valid claims against the estate. It was no part of his legal duty to represent these unliquidated claimants. The pleading presented by the administrator was not in the least binding upon them, because their action was pending against Mary E. Haviland, administratrix of Michael Haviland, deceased, and other bondsmen on the Hoffman bond, at the time, and long prior to the date when Mary E. Haviland brought her action to restore the deed.

The action of these claimants being a pending one, it was notice to the world, and especially to Mary E. Haviland, individually, as devisee, of the claims being thereby asserted, the doctrine of *lis pendens* operating with full force against all the lands which stood in the name of Michael Haviland, including that devised to her.

It is now the duty of a court of equity to take notice of all the equities existing between these parties.

It is a case of pure "equities," and not of *res adjudicata*; the decree pleaded does not constitute a plea of *res adjudicata* against the judgment creditors because they were not parties to the action and were not represented therein.

On the contrary, Mary E. Haviland, to whom the legal title of the land in question has been decreed, stands charged with all of the equities arising from the circumstances in this case in favor of the judgment creditors.

The decree in her favor, under all the circumstances, does not entitle her to as much consideration as if the deed itself had actually been produced and recorded, though tardily, and the judgments against her husband's property had merely intervened before she had placed her deed on record.

The question presented by the pleadings, instead of being one of *res adjudicata*, is merely one of the "equities;" the decree in Mary E. Haviland's favor is to be considered much in the same light as if she had placed her deed on record, excepting that under all the circumstances the equities are very much against her, because of her own conduct which estops her as against these judgment creditors. She stood by the Haviland administrations until the Supreme Court decision fixed the bond liability, and then she took up her individual warfare.

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The question is novel, and difficult to bring within any existing statutes or adjudication, but it is not at all difficult to discover the equities existing in favor of the judgment creditors, as against Mrs. Haviland.

It is even doubtful whether the statute, Sec. 4134 Rev. Stat., governing the registration of conveyances, applies in this case, because Mrs. Haviland's title has not been put upon record by virtue of that statute. In the absence of her compliance with the terms of that statute she resorted to the extraordinary powers of a court of equity, to make up for her failure to do that which the statute required of her, to make her title good, at least against *bona fide* purchasers. So that now, as between herself and these judgment creditors, there appear to be no technical barriers in the way, and a court of equity is now at liberty to follow the dictates of conscience.

The conclusion is that the demurrer to the plea of *res adjudicata* set forth in the amended answer of Mary E. Haviland is well taken, and therefore is sustained.

The question then arising in respect to her answer to the second amended answer and cross petition of the Tribune Fresh Air Fund Society, is whether she can amend so as to present a valid defense.

Judgment may be rendered upon the pleadings, according to this opinion, unless good cause may be shown to the contrary.

Searching the record upon the demurrer, and considering the demurrer to the reply of plaintiff in the same connection, which is also overruled, it is apparent that the plaintiff and the cross petitioners are entitled to the relief asked for by them according to the decision reached by this court.

Ignoring the plea of *res adjudicata*, the question is then only of priorities between the judgment creditors, and Mary E. Haviland.

The priorities may be considered from two standpoints, namely: One from the viewpoint of the conduct of Mary E. Haviland; the other as the dates of the judgments of the creditors, and of Mary E. Haviland, and the operation and effect of Sec. 4134 Rev. Stat. upon each of the judgments.

As to the first, the conduct of Mary E. Haviland, there is much to be considered, and it covers a great period of years.

She avers that on or about the year 1863, having about the sum of \$2,500, she loaned the same to her husband; that in the middle of 1882, nineteen years after the loan, and the limitation had run upon her demand, and to repay her, Michael Haviland deeded her the property, consisting of three parcels, being farm land and city lots, and part of the same property described in the petition of plaintiff; that the deed was duly delivered to a trustee and by the trustee to her, but that the same were not recorded; that she kept the deeds in her pos-

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session in her private box until some time in the year 1890, when she discovered that they were missing and her husband admitted to her that he had destroyed them; that they were destroyed without her knowledge; that on her demand he refused to restore them, but that he told her he would make a will and leave all to her, but she still insisted upon his making the deeds, which he refused and neglected to do.

From the year 1890 or 1891, when the deed was destroyed, she demanded a new deed and he refused, promising to make a will and give her all his property until the death of her husband; she acquiesced and made no further complaint about the deed, so far as the pleadings show. This was four or five years afterwards, he having died October 31, 1895. The will being admitted to probate, Mrs. Haviland actually went into possession of all her husband's property November —, 1895, and actually sold some of it, as devisee.

It appears that Michael Haviland purchased the property in question with his own means, leased it and collected the rents, paid the taxes and exercised full control over it with full knowledge, consent and approval of his wife, from the time of the destruction of the deed until his death.

On August 21, 1897, Margaret Fleming brought an action on the bond of Ripley C. Hoffman, executor of Margaret Fleming against the bondsmen; and Michael Haviland being one of the bondsmen, and deceased, Mary E. Haviland, as administratrix of his estate, was made a party defendant. This action proceeded until upon demurrer to the petition on a question of bond liability arising by virtue of the provisions of the will, judgment was rendered, and error was prosecuted to the Supreme Court. The case was there decided on April 22, 1902, finding the Michael Haviland estate liable.

Thereupon, Mary E. Haviland resigned as administratrix and Hiram S. Bronson was appointed. This action on her part was taken with the evident purpose of bringing the action to restore the deed, not *lost*, but *deliberately destroyed* by her husband, which was filed by her May 31, 1902.

From the date she discovered that her deeds were destroyed in 1890 or 1891 to the date of her suit, May 31, 1902, eleven or twelve years had elapsed, during which period she had remained silent, and allowed the creditors of her husband to know nothing about her claims. In the meantime, she had accepted the terms of the will and was operating as devisee thereunder. She had followed the bond liability suit from 1897 to April 22, 1902, five years, and did not discover the need of her *destroyed* deeds until the Supreme Court fixed the liability.

She thereupon proceeded with her *equity* suit to restore the *destroyed* deed, to keep the judgment creditors from getting the property.

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She had fought them for five years resisting the liability without taking this new role of owner by deed.

The suit filed by her was against only the administrator of her husband's estate and the heirs. The creditors were not invited into her suit by summons, and strange to remark, she was able to put them out by motion, and successfully closed the doors of the court of equity to them in that suit.

Fortunately for them, however, they were already in a court which administers both law and equity, and their action was *lis pendens* against the property which she was seeking to recover in defiance of their rights.

This doctrine of *lis pendens*, if it did not operate upon her conscience, charged the land which she is trying to withdraw, and now operates against her rights with much force. It is a strong ballast to the equitable doctrine of estoppel now operating against her. Collusion is charged against her in the action to restore the *destroyed* deed, and therefore it may be X-rayed regardless of the plea of *res adjudicata*.

De hors the pleadings in question upon the demurrer, the original papers in her case being placed in the hands of the court, it appears to have been a friendly action, as all of the nominal defendants entered their appearance. The defendants did not have much concern in the action because all the property went to Mrs. Haviland under the will; and if she didn't get it these judgment creditors would, so it was not of much concern to the heirs, and the administrator would not be concerned, unless it would be necessary to sell it to pay debts. But this officer, so far as he represented any tangible right, was like a fifth wheel to a wagon in that action. He can only sell real estate to pay debts when it is there. And the only complaint he can make when it has gotten out of his decedent's name, is when the decedent himself had conveyed it away in fraud of creditors. He cannot complain when the widow withdraws it from the creditors, by an alleged equity suit, so that his appearance in that case meant nothing, except that what he did do in the circuit court in failing to press the motion for new trial, and approving the entry, without exception, simply made it easier for Mrs. Haviland to get her decree, and unwittingly supports the claims in plaintiff's reply.

The whole conduct of this case militates against Mrs. Haviland by way of estoppel.

The most damaging thing in it all was the fact that her right of action was barred by the statute of limitation. Her action was one in equity and the ten year limitation applies.

It may be remarked here that equity ordinarily restores only lost instruments. These deeds were not lost, but destroyed deliberately by the grantor, the husband of the grantee.

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These creditors not being parties to that action can now make such claims as this. It is not a novel idea to compel the restoration of a deed destroyed by the grantor, made under the old law, when a trustee had to intervene to make a deed between husband to wife, without making that trustee a party?

Is there really any remedy by a wife in equity against an administrator of her husband's estate, and children of the deceased, to have title to real estate declared in her by virtue of deeds made by the husband for a stale loan to him by his wife, where the husband has deliberately destroyed the deeds before they were placed on record, and long afterwards by the will of the husband the widow as devisee has taken possession of the very property in question? Surely not as against creditors who were not parties. And the suggestion of the question is in no disrespect of the former decree of this court, it not being *res adjudicata*, and a charge of collusion opens the way, and is as potent against a decree as anything else.

Some very good people unwittingly may be guilty of practicing what turns out to be constructive fraud.

Under *Thompson v. Hoop*, 6 Ohio St. 480, the widow can be held to be estopped from asserting dower in the property by her conduct in actually accepting the will. She surely ought to be estopped from asserting individual ownership of particular portions of the property in question, especially under all the circumstances, if she is estopped from taking dower by operating under the will.

The conclusion is that Mary E. Haviland is estopped from claiming priority of her title by virtue of the decree as against the judgment creditors, on the ground both, that the decree is not binding on them, and, because the widow is estopped by her conduct, as well.

In *Smith v. Willard*, 174 Ill. 538 [51 N. E. Rep. 835; 66 Am. St. Rep. 313], it was held that:

"If a married woman furnishes money to her husband for the purpose of purchasing property for her, instructing him to take a conveyance in her name, and he, on the contrary, takes it to himself, which she permits to stand for seven years and without making any inquiry respecting it, she is estopped, as against his creditors, from claiming that the property is held by him in trust for her."

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"Where a married woman holds out to the world that her husband is the owner of property in which she has a resulting trust, or permits him to so act as to induce others to believe he is the owner of such property or has the power to bind her, third persons acting reasonably on the strength of such belief, and giving credit to him thereupon, will be protected. * * * The husband afterward rented the land and collected such rents." After seven years she secured title from her

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husband, but withheld it from record, "during which time the rights of her husband's creditors have matured."

The statute of Illinois is much stronger than that of Ohio.

To similar effect: *Taylor Commission Co. v. Bell*, 62 Ark. 26 [34 S. W. Rep. 80]; *Pierce v. Hower*, 142 Ind. 626 [42 N. E. Rep. 223]; *Hopkins v. Joyce*, 78 Wis. 443 [47 N. W. Rep. 722]; *Minnich v. Shaffer*, 135 Ind. 634 [34 N. E. Rep. 987]; *Swartz v. McClelland*, 31 Neb. 646 [48 N. W. Rep. 461]; *Hamlen v. Bennett*, 52 N. J. Eq. 70 [27 Atl. Rep. 651].

The second point which may be considered in sustaining the demurrer to the answer of Mary E. Haviland, and in overruling the demurrer to the reply of Margaret L. Fleming, involves the dates of the judgments of the creditors, and of that of Mrs. Haviland, and the operation of Sec. 4134 Rev. Stat., upon each of the three judgments.

First as to the facts:

April 22, 1902, the Supreme Court affirmed that action.

June 18, 1904, judgment in the common pleas was rendered in favor of Mary E. Haviland, restoring her title.

December 17, 1904, judgment was rendered for Margaret L. Fleming for \$2,115, on her pending action.

September, 1904, the date of the lien of her judgment.

June 17, 1905, judgment for the Tribune Fresh Air Fund Society for \$9,189.96.

February 12, 1906, the final judgment by the circuit was rendered in favor of Mary E. Haviland.

The lien of the Fleming judgment took effect September, 1904.

That of the Tribune Fresh Air Fund Society from April, 1905.

In considering the priorities of the judgments the only question is whether the date of the Haviland decree shall be as of the judgment rendered by the common pleas or circuit court.

By Sec. 5235 Rev. Stat.: "When an appeal is taken, and bond given, the judgment is thereby suspended, unless some part * * * be an injunction."

This section coupled with the previous sections is intended merely for the purpose of providing a mode of staying the execution of the judgment to enable the appellant to take his case up on appeal, when the execution would destroy appellant's right.

Section 5236 Rev. Stat. provides that:

"When the party against whom a judgment is rendered appeals his cause to the circuit court, the lien of the opposite party on the real estate of the appellant, created by the judgment, shall not be removed or vacated by the appeal; but the real estate * * * shall be bound, in the same manner as if the appeal had not been taken, until the final determination of the cause in the circuit court."

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It would seem to be the intention of these two statutes merely to provide for the two conditions, and none other, viz.: (1) to prevent the issue of execution by the prevailing party which would render useless the appeal by the defeated party; and (2) to preserve the lien of the class of judgments which operate as a judgment upon the lands of the judgment debtor to prevent him from disposing or encumbering the same, or to prevent other intervening liens, pending the appeal.

As appeals can only be taken in civil actions wherein the right of trial by jury does not exist, it follows that Sec. 5236 can apply only in a limited number of equity cases, where a money judgment is rendered as the final judgment in the case, as in foreclosure, accounting, contribution, specific performance where money judgment is rendered in the alternative.

Judgments rendered in such cases are the only ones coming within these sections, so that reformation, subrogation, restoration, such as the Haviland decree, stand upon a different basis.

It may be, however, that an appeal does not operate to vacate or annul the judgment in a case like the one in hand, but merely suspends its execution or enforcement during the pendency of such appeal, as stated recently by the Supreme Court in a case where the sole question was whether error proceedings could be prosecuted to the judgment appealed from before the appeal is settled. *Jenney v. Walker*, 80 Ohio St. 000; 54 Bull. Supp. 153).

But it does seem that in the consideration of the question of pure equitable priorities between these three judgments in view of the section of our statutes relating to registration of conveyances, in determining the relative equitable rights of the parties, the date of the final decree in the circuit court, February 12, 1906, may be considered as the governing date in view of Sec. 4134 Rev. Stat., if the judgment is to be considered as coming within that section at all, rather than June 18, 1904, when the Haviland decree was rendered in the common pleas court.

Especially should this be so in view of all the facts which have already been held sufficient to operate to estop Mrs. Haviland from asserting her judgment as conferring upon her a title superior to these judgment creditors.

Especially should this be true, in view of the fact that her judgment is not binding upon the judgment creditors, who may now urge as an equity that by virtue of Sec. 4985 Rev. Stat., her action was barred as against them. As already stated, they were the only class of persons in view of the Haviland will who had any substantial interest in her suit.

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From this viewpoint of the case, looking to the effect of the judgment of Mrs. Haviland in its relation to Sec. 4134 Rev. Stat., and the operation of that statute, the question is whether or not her judgment can be considered as the recording of her conveyance; and if so, whether it shall be as of the date of the judgment in the common pleas, June 18, 1904, or in the circuit court, February 12, 1906.

In equity, as already held, she is estopped from asserting her priority, so that this would seem to dispose of the question just proposed. This is the view taken.

But, furthermore, the Haviland decree not seemingly coming within the purposes of the two statutory provisions in appeal cases above referred to, it would be reasonable, and especially equitable under the facts here, to consider the date of her record of title as that of February 12, 1906, which would make her title inferior to the lien of the judgment creditors, which is the view of the court.

This must be the rule, unless she is entitled to the advantage of a doctrine pertaining to priorities between judgment liens and unrecorded conveyances maintained by some authorities, to the effect that the judgment lien is not entitled to priority over an unrecorded conveyance where the judgment creditor learns of the unrecorded conveyance before his judgment is taken. Pomeroy's Eq. Jurisp. Sec. 722 (3 ed.) and authorities cited.

It is apparent that the judgment creditors learned of the unrecorded *destroyed* deeds when Mary E. Haviland brought her suit to have them restored, May 31, 1902. But this rule is not applicable, because of the equities arising from the conduct of Mrs. Haviland in favor of the creditors, which estops her.

And it is not applicable, because the decisions sustaining the above rule have been between judgment creditors and the holder of an unrecorded deed actually recorded, and not under circumstances as in this case, where the question is between judgment creditors, resisted by the claimant of a conveyance deliberately destroyed by the grantor, and eleven or twelve years thereafter such claimant brings an action to restore the same.

It is a well understood rule that a judgment becomes a lien upon that interest only which the debtor has in the real estate, at the time of the rendition thereof. If the lands in the hands of the judgment debtor are subject to a trust, contract of sale, or other equities, the lien of the judgment becomes subject, and is subordinate to these equities. *Leonard v. Broughton*, 120 Ind. 536 [22 N. E. Rep. 731; 16 Am. St. Rep. 347].

If a wife in good faith furnishes her husband money to buy lands, and directs him to take title in her name, but he takes it in his, a resulting trust results, and her interest cannot be affected by his judg-

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ment creditors, so long as she is not guilty of laches and conduct to the injury of his creditors. *Miller v. Baker*, 166 Pa. St. 414 [31 Atl. Rep. 121; 45 Am. St. Rep. 680].

If the wife claiming by an unrecorded deed be guilty of laches, especially such as flagrant as appears in this case, and especially where she takes by will and then undertakes to take under a *destroyed* deed long acquiesced in by her, the equitable rule applied in such case by a number of decisions is that her rights are inferior to those of judgment creditors of her husband.

This deed was given by husband to wife for a *past* consideration for a loan made many years before. Such conveyances or securities for such consideration, are not favored. *Wheeler v. Kirtland*, 24 N. J. Eq. 552; *Dwight v. Newell*, 3 N. Y. 185.

The registration statutes in some states protect judgment creditors as well as *bona fide* purchasers, but Sec. 4134 Rev. Stat. does not provide for any but *bona fide* purchasers. Conveyances, unrecorded, only as to them are deemed fraudulent.

Wright v. Bank, 59 Ohio St. 80 [51 N. E. Rep. 876], is cited as authority in support of Mrs. Haviland, which was a case where it was sought to reach lands held in trust; the only reference in that decision pertinent here is just what Sec. 4134 Rev. Stat. provides, that a deed as against subsequent *bona fide* purchasers, without notice, must be recorded, but such record is not required as against other parties.

It seems entirely clear that a proper construction of this section completely eliminates not only judgment creditors as to their lien, but any one who claims title by virtue of a judgment or decree, the position of Mrs. Haviland here.

Mrs. Haviland cannot claim anything from the section, because, conceding that she once held an unrecorded deed from her husband, he never made another deed for the same property, and the section is only to protect subsequent *bona fide* purchasers. She was not a *bona fide* purchaser within the statute, because there is no conflict between her as a subsequent purchaser, there having been no conveyance by her husband previous to hers upon which the statute could operate.

She would not occupy a very desirable position as a *bona fide* purchaser.

In *Morris v. Daniels*, 35 Ohio St. 406, 413 (cited by counsel for Mrs. Haviland), the court said:

"Under this statute, a subsequent purchaser will not be protected against a prior unrecorded deed, unless the purchase be made in good faith, for a valuable consideration, and without knowledge at the time, of the existence of the former deed."

There is no such situation here. Mrs. Haviland is not a sub-

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sequent purchaser. She slept on her rights, satisfied with conditions, until the judgment creditors' suits intervened.

The question of priority in this case, therefore, is one appealing to the conscience of the court.

Looking to the dates, considering the judgment of Mrs. Haviland as of February 12, 1906, which may be done as before explained, the judgment of Margaret L. Fleming is first, that of the Tribune Fresh Air Fund Society, second, and that of Mary E. Haviland, third.

This conclusion is justified from all the facts and circumstances hereinabove stated.

Practically the same idea is embodied in *Van Thorniley v. Peters*, 26 Ohio St. 471, which was a contest of priority between one holding a defective mortgage who sought to have it reformed, and subsequent judgment creditor.

The court held that:

"A defective mortgage when reformed will not affect the lien of a judgment rendered between the date of the execution and the reformation of the mortgage."

As between the holder of the defective mortgage and the judgment creditors, the court ordered the distribution in favor of the judgment creditors.

In Minnesota, where there is a statute which places docketed judgments upon the same footing as a recorded conveyance, and gives to it precedence over an unrecorded deed, unless the judgment creditor have other notice of the unrecorded conveyance, it was held in *Wilcox v. Bank*, 43 Minn. 541 [45 N. W. Rep. 1136; 19 Am. St. Rep. 259], that a "judgment has precedence * * * over a mere equity on the part of a grantee, of which the judgment creditor has no notice, to have a deed reformed as to make it include the real estate in question."

There was no suit commenced, or a decree in equity in that case, as there is in the one at bar.

The principle expressed in *Coe v. Erb*, 59 Ohio St. 259 [52 N. E. Rep. 640; 69 Am. St. Rep. 764], has some bearing by analogy. There a judgment was rendered, but no entry had been actually put upon the record. In the meantime a *bona fide* purchaser had taken the property. A *nunc pro tunc* entry of the judgment was sought so that the lien would antedate the conveyance. This was held inequitable. And so is it inequitable to permit the judgment in favor of Mrs. Haviland even if it actually *ante* dates the judgments, to come in ahead of the judgments.

Almost the precise situation is presented in *Sternberger v. Ragland*, 57 Ohio St. 148 [48 N. E. Rep. 811]. William Ragland purchased a lot, gave a mortgage to his grantor for unpaid purchase money, which was recorded, but the deed was never filed for record.

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Judgments were recovered against Ragland's grantor after the conveyance was made and the mortgage was recorded. Executions were levied, the property sold, and the judgment creditor became the purchaser.

The holding was: "Where a judgment debtor appears of record to be the owner of real property, it is subject to the liens of judgments recovered against him and to judicial sale thereunder; and a *bona fide* purchaser at such a sale, without notice of an unrecorded deed made by the judgment debtor before the rendition of the judgment, is within the protection of the statute, and acquires the title as against the grantee in the deed; and in this respect the rights of the judgment creditor, when he becomes the purchaser, are not different from those of other purchasers at judicial sales."

The demurrer to the amended answer of Mary E. Haviland is sustained. The demurrer of Mary E. Haviland to the reply of the plaintiff is overruled.

EMINENT DOMAIN.

[Hamilton Common Pleas, February, 1909.]

CINCINNATI V. ADAM MUELLER.

VALUE OF LEASEHOLD AND REVERSIONARY INTERESTS IN PROPERTY APPROPRIATED FOR
STREETS NOT DETERMINABLE UNTIL MUNICIPALITY ELECTS TO TAKE IT.

Lessees, in an action by a municipality to assess the value of premises sought to be appropriated for street purposes, have no constitutional or statutory right to demand a determination of the value of leasehold and reversionary interests of the property until the municipality elects to take the premises at the value assessed by the jury and the judgment assessing such value has become final.

[Syllabus approved by the court.]

A. H. Morrill and C. F. Hornberger, for plaintiff.

G. C. Wilson, Judson Harmon, G. F. Osler, P. A. Reece, G. P. Stimson and W. C. McLean, for defendant.

HUNT, J.

This is an action brought by the city of Cincinnati to assess compensation to the owners of a strip of ground thirty-four feet in width on the west side of Gilbert avenue from McMillan street to Florence avenue, appropriated by ordinance of council for widening Gilbert avenue.

The values of seven distinct lots or parcels of land are in controversy. The aggregate verdict as to these lots is \$93,712. The property was advantageously situated, some of it on and the rest of it near a central, if not the most central, hilltop business corner, and

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the evidence as to the value of the ground reasonably and greatly differed, thereby giving the jury considerable latitude as to what would be a reasonable verdict.

After the verdict a motion for a new trial was duly filed by the property owners. The city filed no such motion. The decision upon the motion was reserved only as to the weight of the evidence.

This question being a question as to the value of the property was peculiarly within the province of the jury. The character of the property was such that there could be a considerable difference in opinion as to its value, and upon this conflicting evidence, especially as it was expert testimony, there could reasonably be considerable difference in the opinions to be formed from such evidence.

After a careful examination of the evidence the court does not come to the same conclusions in all respects as determined by the verdict of the jury, but such differences are such as might exist between reasonable men, and therefore are not such as would warrant the court upon a motion for a new trial, in saying that the verdict or any part of it is not sustained by the evidence.

There was another question passed upon during the trial in this case, which I have been asked to reconsider. That is as to the right of certain lessees of some of the property described in the petition, who were made parties defendant by the city, to have the value of their leasehold interests and the value of the reversionary interests separately determined by the jury impaneled to assess the value as between the city and the property owners.

The lessees offered testimony as to the value of their leasehold interests, and objection thereto being made by the city, the court sustained such objection.

There is no question but that the lessees are owners of a property right which cannot be taken without compensation. As such owners, they are proper and necessary parties in a proceeding brought to assess the value of the property sought to be taken, but so are other owners whose rights may be joint, in common, by way of mortgage or in any other form.

The property being taken for street purposes could be taken under Art. I, Sec. 5, of our constitution and the compensation assessed and paid afterwards, so that there is no constitutional right in the owners, jointly or severally, to have their compensation fixed and paid, or deposited before the taking. The legislature has, therefore, the right to determine the method of taking by the city, and the order of procedure to be followed in assessing compensation, so long as such method does not preclude compensation to be assessed by a jury.

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The city and the property owners are therefore governed by the municipal code in the taking and assessing the value of the property to be taken, unless constitutional rights are violated.

After providing for the passage of certain ordinances, resolutions, etc., Sec. 13 of the Mun. Code of 1902 (Lan. Rev. Stat. 3590; B. 1536-106) provides for the filing of a petition or application by the city solicitor in the court of common pleas, probate court, or insolvency court, "which application shall describe as correctly as possible the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof." After providing for a notice to such owners, Sec. 15 (Lan. Rev. Stat. 3592; B. 1536-108) provides for the impaneling of a jury, "for the assessment of compensation," which "jury shall be drawn and the trial proceed as in other civil actions." In Sec. 16 (Lan. Rev. Stat. 3593; B. 1536-109) it is provided, "that no delay in the proceedings shall be occasioned by doubt as to the ownership of any property, or as to the interests of the respective owners, but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute; and in all cases, as soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken."

This section further provides, that "The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained."

The statute does not say that the assessment shall be so made that the value of the interest of each owner in each lot or parcel of land shall be ascertained.

After such verdict and necessarily after judgment thereon, Sec. 18 (Lan. Rev. Stat. 3595; B. 1536-111) provides, that "The court shall make such order as to the payment, deposit or distribution of the amounts assessed as may seem proper, may require adverse claimants to all or any part of the money or property to interplead and fully determine their rights in the same proceeding and may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order giving possession." And further provides that, "upon the payment or deposit by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in said corporation, unless a lesser estate or interest is asked for in the application."

In this section the only assessment by the jury contemplated by the statutes is the value of the lot or parcel of ground, for how other-

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wise could the city be vested with the estate in fee simple, or with the full estate or interest in such lot asked for in the petition?

In none of these sections can the words, "each lot or parcel of land," mean each separate interest in any lot or parcel of land. Nor is there in any such sections any requirement that the value of the several interests in the said lot or parcel of land shall be separately ascertained, until after the verdict has been made final by judgment thereon. When the time arrives for the distribution of the amount of compensation assessed as to any lot, the court, if advisable, or if the parties are entitled thereto, can and will submit issues of fact to a jury "as in other civil actions." If, therefore, the several owners of separate interests in any lot as to their respective parts of such compensation, are entitled to a jury, the exercise of such rights is not precluded by the municipal code as now construed. Such right, to say the least, is doubtful, but is not necessary to be determined until the time for distribution arrives.

Section 22 (Lan. Rev. Stat. 3599; B. 1536-115) provides, that if the city fails to pay for or take possession "within six months after the assessment of compensation," its right so to do "on the terms of the assessment" shall cease.

The primary object of these proceedings seems to be to ascertain the amount which the city must pay or deposit before taking possession, or before being put to its election as to whether or not it will take upon the terms of the assessment, and this amount or assessment being ascertained as to each lot after all parties interested therein have had an opportunity to take part in the ascertaining of this amount, to permit all questions of separate or conflicting interests to be determined after the city has elected to take. After the owners of such separate or conflicting interests have been properly made parties in the assessment of the value of each lot or parcel of land, and the money has been deposited under the orders of the court, the city is no longer interested in any further proceedings.

Moreover, it would be a useless proceeding to determine the separate value of the several interests in any lot or parcel of land if the city should not elect to take, or to determine the separate value of the interests of the lessor and lessee until the lessee's possession is disturbed, or to determine the value of his unexpired term, when the lease is a short term of months, as are some of the leasehold interests in this case, especially if the proceeding had not been instituted in the common pleas court, but in the probate or insolvency courts, from whose judgments there is a right of appeal to the common pleas court, without giving the city the right to deposit the money or take the property pending the appeal. Even after judgment by the common

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pleas court, if the city or property owners should prosecute error to the judgment of the court upon the verdict under Sec. 21 (Lan. Rev. Stat. 3598; B. 1536-114), whether the city elected to deposit the money and take the property pending such error proceeding or not, the question of distribution as between the lessor and lessee or other interests could not be finally determined until the verdict and judgments had been made final between the city and the owners of the lots or parcels of ground. If the city should not elect to pay or deposit the money and take possession before the termination of these error proceedings, the lessee would not be disturbed in his possession and the pecuniary value of the leasehold interests would be constantly diminishing, and that of the lessor increasing, until the termination of the lease.

Certain testimony, such as the rental value, has in some cases been held to be relevant as between lessor and lessee in the determination of the separate values of their several interests, but has been held to be irrelevant as between the city and the owners of the lots or parcels of land. If the jury is to determine the separate values of the several interests at the same time at which they determine the value of the separate lots, what rule is the court to follow, and if all the evidence competent under either issue is admitted, what instructions are to be given to the jury?

It seems, therefore, that the objection to the testimony offered by the lessees was properly sustained not only in accordance with the statutes, but in furtherance of simplicity in the issues to be presented to the jury and expedition in the administration of justice as between the parties.

EXECUTORS AND ADMINISTRATORS—JUDGMENTS.

[Clark Common Pleas, 1907.]

ADOLPHUS H. SMITH v. WESTERN UNION TEL. CO.

1. DETERMINATION OF COMPETENCY OF TRUST COMPANY AS EXECUTOR CANNOT BE COLLATERALLY ATTACKED.

Probate courts having jurisdiction under Art. 4, Sec. 8, of the constitution and Sec. 5995 Rev. Stat. in all testamentary matters, have power to hear and determine the competency of a trust company to perform the duties of an executor under Secs. 3821c and 3821f Rev. Stat. *et seq.* Having determined the competency of the appointee, though wrongly and contrary to a subsequent decision of the Supreme Court, its judgment cannot be attacked collaterally upon a motion by the trust company after such decision asking that a suit brought by deceased be revived in its name as executor.

*Reversed, *Western Union Tel. Co. v. Savings & Trust Co.* 30 O. C. C. 380; without report, *Union Savings Bank & Trust Co. v. Telegraph Co.* 78 Ohio St. 898; common pleas affirmed on rehearing, *Union Savings Bank & Trust Co. v. Telegraph Co.* 79 Ohio St. 81.

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2. PRESUMPTION OF REGULARITY OF PROCEEDINGS IN PROBATE COURT.

The probate court being a court of record, it follows that all the steps necessary to the rendition of a final judgment have been taken; hence, while letters of administration attached to a stipulation may not show specifically that a trust company was legally competent to exercise the duties of an executor, such finding will be presumed.

3. EXECUTOR A DE FACTO OFFICER.

An executor or administrator is a *de facto* officer. Hence, a trust company appointed executor under Secs. 3821c and 3821f Rev. Stat. prior to the Supreme Court's holding such statutes unconstitutional, will be deemed a *de facto* executor until removed by direct attack in the probate court.

[Syllabus approved by the court.]

C. L. Spencer and E. S. Houck, for plaintiff.

Martin & Martin, for defendant.

KUNKLE, J.

The plaintiff seeks to recover damages for injuries to certain of his shade trees. It is claimed they were marred or injured by the defendant in the trimming of the same. The case was brought a number of years ago.

Upon the death of the plaintiff the Union Savings Bank & Trust Company was appointed executor of the last will and testament of the said Adolphus H. Smith. The trust company accepted such appointment, gave bond, entered upon the discharge of its duties as such executor, and since said date has been acting in such capacity.

In 1904 the trust company filed a motion in this court asking that this case be revived in its name as such executor. A conditional order of revivor was issued upon this application, and the defendant filed an answer setting forth two reasons why this case should not be revived in the name of the trust company as such executor.

The first reason so assigned is, that said trust company is not the duly appointed and qualified executor of the last will and testament of Adolphus H. Smith; that said trust company has no authority to act as such executor, is not the legal representative of said decedent, and cannot prosecute this case for or on account of the said decedent's estate.

The trust company, for reply, states that it is the duly appointed, qualified and acting executor of the last will and testament of said decedent.

An agreed statement of facts has been filed which shows that the trust company was appointed such executor on August 11, 1902, by the probate court of Clark county, Ohio; that it accepted such appointment; qualified; entered upon the discharge of its duties, and since said date has been acting in that capacity. A copy of the letters of appointment are attached to the stipulation. It is also agreed that at the time of such appointment the said trust company was and ever

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since has been a corporation organized under the laws of the state of Ohio.

This case is submitted as to the first defense in defendant's answer, upon the stipulation of the parties, the pleadings relating to such first defense, and the motion of the defendant for judgment in its favor on said pleadings and stipulation.

The legislature of Ohio, prior to the appointment of said trust company as such executor, enacted Secs. 3821c, 3821f Rev. Stat. *et seq.*, by which it attempted to confer upon such trust companies the power to take, accept and execute such trusts. In *Schumacher v. McCallip*, 69 Ohio St. 500 [69 N. E. Rep. 986], the Supreme Court, February 2, 1904 (several years after the appointment of said trust company as such executor), held that trust companies are without capacity to receive and exercise appointments as administrators of the estates of deceased persons, because the legislation evidencing an intention to clothe them with such capacity is void, being of a general nature, and not of uniform operation throughout the state, as required by Art. 2, Sec. 26, of the constitution.

It is conceded that the trust company does not now have the power or authority to receive or accept an appointment as an executor.

It is claimed by the Western Union Telegraph Company, that by reason of the invalidity of the statutes above referred to, that the trust company is without authority to appear in this court and ask for a revivor of this action in its name.

The trust company claims that the defendant cannot raise this question in the present case, as such a proceeding would be a collateral impeachment of the record of the probate court appointing it as such executor; that the record of the probate court as to this appointment is final and conclusive, until it has been reversed or modified by a direct proceeding; that although the probate court would not now appoint it as such executor, yet having had jurisdiction and having exercised such jurisdiction, the appointment cannot be attacked collaterally; that if the defendant is averse to the trust company conducting the affairs of this estate, that its appointment as such executor must be attacked in a direct proceeding in the court where the original appointment was made.

The telegraph company admits that the findings of the probate court are final and conclusive in all matters in which it had jurisdiction or power to act, but claims that the probate court had no authority in 1902, or at any other time, to appoint an executor, except in cases where such executor was nominated in a will; that although Mr. Smith might have nominated the trust company as his executor, that the probate court was without jurisdiction to appoint the trust company as such

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executor, for the reason that the legislature has limited the nomination, by the testator, and the appointment by the probate court of executors, to those who are legally competent; that by virtue of the decision of the Supreme Court it has been determined that the trust company is not, and at the time of this appointment was not legally competent to serve as an executor, and that therefore the probate court was without jurisdiction and that such appointment was void.

Many of the authorities cited consist of decisions of the courts of other states. An examination shows that many of these decisions are from states where the probate court derives its authority solely from legislative enactments; some are from states where the probate court is not a court of record, and therefore they are of little value in the determination of the case at bar.

Probate courts in Ohio derive jurisdiction, not merely from statutory enactments, but also from the constitution.

Art. 4, Sec. 8, provides that:

"The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, * * * and such other jurisdiction, in any county or counties, as may be provided by law."

The constitution therefore gives the probate court jurisdiction in all testamentary matters.

Section 5995 Rev. Stat. provides that:

"When any will shall be duly proved and allowed, the probate court shall issue letters testamentary thereon, to the executor, if any be named therein, if he is legally competent, and if he shall accept the trust, and shall give bond, if bond required to discharge the same," etc.

An examination of some of the cases cited by counsel show that the limited jurisdiction of the probate court referred to, has reference to the subject-matter over which such court has jurisdiction, and not to its jurisdiction over the matters in reference to which jurisdiction has been conferred.

The Supreme Court, in *Brown v. Reed*, 56 Ohio St. 264, 272 [46 N. E. Rep. 982], says:

"While the probate court is of limited jurisdiction, the limitations chiefly relate to subject-matters. In view of the constitutional and statutory provisions referred to, its jurisdiction to correct the account of an executor in such a case as the rejected evidence tended to show is ample. This conclusion is in harmony with the view generally taken of the subject, and with the unvarying tendency to enlarge the juris-

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diction of the probate court with reference to the subject which it embraces."

Probate courts in Ohio are courts of record, and their jurisdiction in testamentary matters seems unquestioned.

The Supreme Court, in *Sheldon v. Newton*, 3 Ohio St. 494, says:

"The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented, which brings this power into action."

Judge Ranney, in rendering the opinion in this case, says, page 498:

"A settled axiom of the law furnishes the governing principles by which these proceedings are to be tested. If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular, or manifestly erroneous, its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached."

If the probate court of Clark county had jurisdiction to prove the will of Adolphus H. Smith and to hear and determine the question as to whether or not the party named in the will was legally competent to be appointed as executor; and if the probate court did hear and determine the question of the competency of the person nominated as executor, can its judgment thereon now be attacked collaterally?

Can the judgment of the probate court to the effect that the trust company was legally competent to be appointed as executor be attacked by the defendant in this proceeding, wherein the trust company, as such executor, attempts to recover from the defendant on a claim in favor of the decedent?

One of the leading cases in Ohio on the subject of the authority and jurisdiction of probate courts is that of *Shroyer v. Richmond*, 16 Ohio St. 455. This case has never been overruled. The Supreme Court, *Scobey v. Gano*, 35 Ohio St. 550, has, to some extent, distinguished this case, but *Shroyer v. Richmond* has been quoted and approved by the Supreme Court in many cases, both before and since the decision of *Scobey v. Gano*, and especially in the following cases: *Stifel v. Metz*, 34 Ohio St. 396; *Lindemann v. Ingham*, 36 Ohio St. 1, 15; *King v. Bell*, 36 Ohio St. 460, 470; *Wehrle v. Wehrle*, 39 Ohio St. 365, 366; *Arrowsmith v. Harmoning*, 42 Ohio St. 254, 262; *Railroad Co. v. Belle Centre*, 48 Ohio St. 273, 291.

The Supreme Court, in *Shroyer v. Richmond*, *supra*, holds that jurisdiction attaches whenever the application is made for its exercise in a given case and that no irregularity in the proceedings, or mistake of law in the decision of the question arising in the case, will render the order of appointment void, or subject it to impeachment collaterally.

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The probate court is a court of record, and it follows that all of the steps necessary to the rendition of a final judgment have been taken whether the facts are set forth in the record, or whether they are not. While the letters of administration attached to the stipulation in this case may not specifically show that the probate court found that the trust company was legally competent to exercise the duties of an executor, yet it must have so found, and it being a court of record, such finding will be presumed whether it does or does not appear upon the record.

When the court found and determined that the trust company was legally competent—that it had authority to accept the duties and exercise the powers of an executor—was it not such a finding and judgment on the part of the probate court as can be attacked only by a direct proceeding?

The finding and judgment of the probate court was a mistake of law, but if judgments can be attacked collaterally because judges have made mistakes in the construction of statutes, then many judgments are open to collateral attack.

It may be well to note that the decision of the Supreme Court, *Schumacher v. McCallip*, *supra*, was rendered in a case in which error was prosecuted from the probate court to the Supreme Court in regard to the appointment of a trust company as administrator. The decision was not rendered in a case wherein the judgment of the probate court was attacked collaterally.

In *Toledo & O. C. Ry. v. Beard*, 11 Circ. Dec. 406 (20 R. 681), the first paragraph of the syllabus is as follows:

“The probate court has exclusive jurisdiction in proceedings to appoint administrators of the estates of deceased persons, and where the jurisdiction of the probate court once attaches, that court has full power to hear and determine all questions arising in the case, and such determination cannot be collaterally attacked.”

In this case the court say, page 409:

“We think that the question as to the qualification and appointment of this administrator was determined by the probate court, and cannot be collaterally questioned in this case.”

In *Railroad Co. v. Belle Centre*, *supra*, the first paragraph of the syllabus is as follows:

“The probate courts of this state are courts of record, competent to decide on their own jurisdiction, and exercise it to final judgment; and their records import absolute verity.”

The court, in its decision in this case, quotes at length and approves the principles announced in *Shroyer v. Richmond*, *supra*.

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In *Carr v. Hull*, 65 Ohio St. 394, 396 [62 N. E. Rep. 439; 87 Am. St. Rep. 623; 58 L. R. A. 641], the Supreme Court, in rendering the decision in that case, uses the following language:

"It is further claimed that there was no authority under section 6018, Revised Statutes, for the appointment of an administrator *de bonis non*, as in his application he stated that there were no assets, and did not aver that there were any debts to be paid. We may say that, from the record, it seems quite doubtful on the showing made, whether the court had authority to appoint an administrator in the first instance, or to appoint a successor on his death. But be that as it may, we think their appointment cannot be questioned in a collateral proceeding. There should have been some direct proceeding for the purpose. Here it is collateral to the proceeding, being one to sell lands; and it is contrary to the policy of our law to permit a question of the kind to be raised in a collateral proceeding."

Counsel for defendant, in addition to the authorities cited from other states, have also cited certain decisions of our Supreme Court, which it is claimed should control in the determination of this case. We have examined the case, *Dennison v. Talmage*, 29 Ohio St. 433, and think that the decision in that case was based on the fact that the court had no jurisdiction of the subject-matter; it certainly will not be contended that the probate court has no jurisdiction of the subject-matter of appointing executors. *Hoffman v. Fleming*, 66 Ohio St. 143, 157 [64 N. E. Rep. 63], so cited, the court, in answering one of the arguments of counsel, indulge in a discussion as to whether or not the record on its face shows that the decedent was a resident of West Virginia. They answer the suggestions of counsel upon that point by holding that the record does not show upon its face that the decedent was a resident of West Virginia.

What the decision would have been had they found that the word "late" meant "last," we do not know. The court concludes its argument on that proposition by saying:

"We cannot know what evidence may have been adduced in the probate court of Franklin county, Ohio, to show that the last residence of the testatrix was within the jurisdiction of the court. Neither the verity of the record nor the jurisdiction of the court to do what it did do, was challenged in any direct proceeding. Can it be done now in this action?"

We have also examined the case, *Scobey v. Gano*, *supra*. The doctrine announced in that case, at first reading, does seem opposed to the decision, *Shroyer v. Richmond*, *supra*, and the many decisions of the Supreme Court, both before and after *Scobey v. Gano*. A careful examination of the facts in that case, however, and of the decision

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of the court, we think warrants the conclusion that the decision was based, as the court itself says, on the circumstances of that particular case.

We are unable to discuss the numerous authorities, outside of Ohio, cited by counsel for defendant. Some of these, for reasons heretofore suggested, are not applicable; others are not applicable for the reason that the decision was rendered in a case that was taken up on appeal or error, and therefore was not in a case wherein the judgment of the lower court was collaterally attacked. We call attention, however, to two of the cases so cited, viz., *Chew v. Brumagen*, 80 U. S. (13 Wal.) 497 [20 L. Ed. 663], and *Berney v. Drexel*, 12 Fed. Rep. 393. If these cases are to be considered as authority in Ohio, then they conclusively determine the issues involved in the case at bar, against counsel citing them.

The court say, in the syllabus of the case *Berney v. Drexel*, page 393:

"The decision of the surrogate as to the competency of a person to serve, to whom letters testamentary were issued, cannot be collaterally attacked."

If the attention of the probate court was called to this matter by anyone having an interest in either the estate of Adolphus H. Smith, or in this suit, we think there is no doubt but that the mistake of law formerly made by the probate court would be corrected.

Judge Rockel, in his work on Ohio Probate Court Practice, at Section 211, says:

"It may be said to be an inherent power residing in every court to correct an error which may have been committed. This the court might do of its own motion, although it will not generally so set aside an appointment which has been wrongfully made."

Judge Gray, in *Waters v. Stickney*, 94 Mass. (12 Allen) 1 [90 Am. Dec. 122], says:

"This power does not make the decree of the court of probate less conclusive in any other court, or in any way impair the probate jurisdiction; but renders that jurisdiction more complete and effectual."

Section 6017 Rev. Stat. gives the probate court the right to remove an executor for the various reasons therein enumerated, and also gives the probate court the right to remove an executor for any other cause which in the opinion of the court renders it for the interest of the estate that such executor or administrator be removed.

The supreme court of Alabama, *Kroger v. Franklin*, 79 Ala. 505, says:

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"When letters of administration have been granted improvidently or irregularly, the court granting the same has the inherent power to revoke them, either on its own motion or on the application of any person in interest." * * *

Counsel for plaintiff contend that the defendant can in no way be affected by the present executor securing this revivor, as the executor is at least an executor *de facto*, and its acts bind everyone until it is actually removed.

The defendant insists that the appointment is absolutely void, and that the doctrine relating to *de facto* officers applies only to public officers, and not to such officers as administrators, executors, guardians, etc. If the trust company is a *de facto* executor, then its acts would be binding until it was removed by direct proceedings in the probate court. The decision of the circuit court, *Union Sav. Bank & Tr. Co. v. Smith*, 26 O. C. C. 317 (4 N. S. 237), would seem to indicate that the court did not consider the appointment of a trust company as executor as being absolutely void. The court held, in that case, that where a trust company which was, without objection, appointed executor of an estate by the probate court prior to the recent decision of the Supreme Court holding Secs. 3821c and 3821f, unconstitutional, and which has since performed and the estate received the benefits of such services, is entitled to reasonable compensation therefor.

The Supreme Court in rendering the decision *Scobey v. Gano*, relied upon by counsel for defendant, says, page 554:

"Amanda, being the administratrix of Horatio S. Kinney, was ineligible to be guardian of the estate of a minor who was interested in the estate of decedent. She was merely a guardian *de facto*."

If the reasoning of the Supreme Court in *Scobey v. Gano* is correct, then the trust company is a *de facto* executor, and the defendant cannot be prejudiced by its actions in this case.

We think the probate court had jurisdiction to hear and determine the question as to whether or not the trust company was legally competent to exercise the powers and perform the duties of executor. If the probate court has not jurisdiction to hear and determine the question of the competency of an executor named in the will, what tribunal has jurisdiction to hear and determine such questions primarily? The common pleas, circuit and supreme courts may review the judgment of the probate court in these matters, but certainly neither of these courts

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has original jurisdiction to hear and determine the question as to whether or not the executor named in the will is competent.

We think the probate court not only has such jurisdiction, but that it exercised it in this case. Its determination on the question of the competency of the executor was wrong, but we think its judgment cannot be attacked collaterally.

The case will be revived in the name of the trust company as such executor.

INTOXICATING LIQUORS—TAXATION.

[Superior Court of Cincinnati, 1904.]

D. H. BALDWIN & CO. v. NANNIE PELTON ET AL.

• DOW TAX LIEN SUPERIOR TO ALL OTHER LIENS.

Lien of the state for taxes under the Dow law takes precedence of other liens, even a purchase money mortgage. Possession of property is conclusive evidence of ownership under tax laws. The fact that the business in which the property is used is unlawful does not affect the right of the state to collect the tax by sale.

[Syllabus by the court.]

Drausin Wulsin, for plaintiff.

Ampt, Ireton, Collins & Schoenle, county solicitors, for defendant.

HOSEA, J.

Petition was filed September 17, 1903, in foreclosure of a chattel mortgage dated March 19, 1901, to secure balance of purchase money due upon a piano; and recites the fact of seizure by John H. Gibson, treasurer of Hamilton county, and threat of sale. The court is asked to take possession by a receiver, to marshal liens, etc. On the same day, the sheriff was appointed receiver.

Gibson, treasurer, by way of cross petition, sets up due proceedings under the Dow law (act 92 O. L. 34; Sec. 4364-9 Rev. Stat. *et seq.*), whereby the property was levied upon and seized by the treasurer for the nonpayment of the tax therein provided for, assessed against the principal defendant, Pelton, for one year from the fourth Monday in May, 1903, and claiming that such levy takes precedence of all other liens.

It is also alleged that the principal defendant, Pelton, kept the premises as an improper house in connection with the sale of liquor.

The treasurer asks for a sale and satisfaction of his lien of \$436.80.

Upon the hearing it was shown that the piano was sold by the plaintiff and a chattel mortgage duly taken upon deferred payments,

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and was valid as to a balance of about \$40 remaining unpaid at the date of levy; that the defendant, Nannie Pelton, kept an improper house, and sold liquors; and that the piano was part of the furniture of the establishment, all of which was duly levied upon for the Dow tax and penalties.

The question raised and argued in the case, is whether the lien of the state for the tax under the Dow law can take precedence of the lien of purchase money mortgage.

The statute in question contains the following provisions:

Section 4364-9. "Upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or copartnership engaged therein, and for each place where such business is carried on by and for such person, corporation or copartnership, the sum of three hundred and fifty dollars."

Section 4364-10 provides for the lien of the assessment on real property, and the time and manner of payment.

Section 4364-11 provides for apportioning the assessment to the portion of the assessment year covered, and for refunder in proper cases in accordance therewith.

Section 4364-12 provides for the collection by the county treasurer in case of a refusal to pay, by distress and sale, as upon execution, of the goods and chattels of such person, corporation, or copartnership.

"And, in case of the refusal to pay the amount due, he shall levy on the goods and chattels of such person, corporation or copartnership, wherever found in such county, or on the bar fixtures or furniture, liquors, leasehold and other goods and chattels, used in carrying on such business, which levy shall take precedence of any and all liens, mortgages, conveyances, or encumbrances hereafter taken or had on such goods and chattels so used in carrying on such business; nor shall any claim of property by any third person to such goods and chattels, so used in carrying on such business, avail against such levy so made by the treasurer," etc.

The language of the statute is explicit, and leaves little room for discussion of its meaning. The question of the case under this statute is not, broadly, whether the property of A can be taken to satisfy a tax assessed against B, but whether property of A used by B in carrying on a certain business can be seized to satisfy a tax assessed against B in respect to such business.

The distinction is incidentally touched upon in the case of *Lake Shore & M. S. Ry. v. Roach*, 80 N. Y. 339, which arose upon a tax law providing that goods and chattels in possession of or upon the lands

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of a person against whom a tax is assessed shall be deemed to belong to him, "and no claim of property made thereto by any other person shall be available to prevent a sale."

Here the court points out that while the purpose of the statute is to facilitate the collection of taxes and prevent embarrassment to the government through fraud and collusion of parties, yet it must be construed reasonably, and did not apply to property of another incidentally and temporarily upon the land of the tax debtor "and in possession of the owner for his own purposes."

The taxing power of the state being vested in the general assembly, the judiciary is not concerned in the question of the propriety of the law except it be shown that the mode of exercise of the power transcends the limits fixed by the constitution. 1 Cooley, Taxation 47.

I do not understand the constitutional question is raised by the defendant here, but it has been settled in favor of the law in *Adler v. Whitbeck*, 44 Ohio St. 539 [9 N. E. Rep. 672], and also in *Anderson v. Brewster*, 44 Ohio St. 576 [9 N. E. Rep. 683], which have been further approved in *State v. Montgomery Co. (Aud.)*, 68 Ohio St. 635, 644 [10 N. E. Rep. 1062].

Indeed, the constitutional validity of laws of this character making the possession of property conclusive evidence of ownership under tax laws seems to be well established in cases analogous to the present. From an examination of some of these cases it would seem that the Dow law had been framed in view of the principles there enunciated.

Thus, in *Morrow v. Dows*, 28 N. J. Eq. 459, the third syllabus is:

"The legislature has power to make taxes a lien paramount to all rights which the citizen may acquire in lands; and mortgages, or liens taken after the enactment of such law, would be postponed to the payment of the public revenues."

The court in the opinion calls attention to the fact that liens are purely statutory in their origin and says that—

"It is an essential attribute of government that power should inhere in the legislature to make the taxes (without which it cannot be maintained and supported), liens on property paramount to all rights that may be acquired by the citizen. The right to establish the preference necessarily results from the right to tax by uniform laws of taxation, all such property as may be requisite to the execution of its functions. Mortgages or liens, taken by the individual, after the enactment of such laws, would unquestionably be subject to be postponed to the payment of the public revenues."

Similar views and rulings appear in *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Parker v. Baxter*, 68 Mass. (2 Gray) 185.

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In *Hersee v. Porter*, 100 N. Y. 403 [3 N. E. Rep. 338], the general question is elaborately reviewed and discussed upon a tax statute providing for distress of goods and chattels in possession, and a clause that "no claim of property to be made thereto by another person shall be available to prevent a sale." In the case cited, as in the case at bar, the mortgagee permitted the mortgagor to retain possession after default.

After discussing the constitutional question and showing that the provision was not a new remedy, the court continues, page 411:

"Each individual in the community has notice of the law, and is presumed to understand that if his chattels are by his consent or permission in the possession of another, they can be taken for a tax against the person in possession. The law was probably framed to prevent fraud or collusion, and disputes as to title, and each individual in the community may be assumed to have consented that his property shall be subject to the right of the state in this way to enforce the power of taxation. * * * As between the owner of the property seized and the person taxed, the latter ought to have paid the tax, and we see no reason to doubt that if the payment is enforced out of another's property in his possession, the true owner has a remedy against the person who ought to have paid it.

"The proceeding * * * was an execution of a power of government in respect to taxation, and although the right to take the plaintiff's property for the tax was not adjudged in a legal proceeding, the act of the legislature, and the acts of the administrative officers thereunder, are, we think, due process of law within the meaning of the constitution."

See, also, *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Lake Shore & M. S. Ry. v. Roach*, 80 N. Y. 339; *Sears v. Cottrell*, 5 Mich. 251; *Dunlap v. Gallatin Co.* 15 Ill. 7.

It is claimed in defense that the provisions of the statute cutting out mortgages and other liens should not be held to apply to a vendor's lien, because (1) the lien of the vendor is the highest and best known for the law, and (2) as the sale of liquor in a house of this character is unlawful, the seller cannot be held to have contemplated such use of the mortgaged property at the date of sale.

As to the first proposition, it is sufficient to say that the statute makes no distinction between a vendor's mortgage and any other. "The statute does not inquire"—as was said in *Hersee v. Porter*, *supra*,—"whether the legal title is in A or B, but conclusively adjudges it to be in the person taxed for the purposes of seizure and sale, provided it is in his possession. For the purpose of collecting the tax, the actual ownership, in contemplation of the statute, follows the

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actual possession. The possession under the statute is not merely a badge of ownership, it is title, so as to subject the property to seizure and sale for a tax against the possessor."

The intention of the owner of the property, therefore, can make no difference in the application of the law. And a little reflection upon the endless possibilities of defeat to the state in the collection of such taxes under the rule contended for here, will satisfy the mind that any other construction of the law would practically defeat its operation. It is not, therefore, to be regarded as an unnecessarily harsh rule, but one absolutely necessary to secure the rights of the state, and therefore demanded by the public interest. The owner, as one of the general public, has conferred upon the legislature the power in question, and is interested in upholding it in behalf of the state in a higher degree than in defeating it in respect of his private interest as an individual. *M'Cullough v. Maryland*, 17 U. S. (4 Wheat.) 316, 428 [4 L. Ed. 579].

The fact that the business is an unlawful one does not affect the right of the state to collect the tax. As was pointed out by Beldon, J., in *DeMonte v. Pabst*, 14 Dec. 97, citing the language of Judge Pugsley in *Stevenson v. Hunter*, 5 Dec. 27 (2 N. P. 300) :

"It would be an anomaly to hold that a violation of the law relieves from the payment of the tax. The result would be that those who are lawfully engaged in carrying on the business must pay the tax, while those who carry on the business in violation of the law are exempt. This would be putting a premium on disobedience to the law."

And the same point was decided, upon unlawfulness created by a municipal ordinance, in *Conwell v. Sears*, 65 Ohio St. 49 [61 N. E. Rep. 155], in which case Judge Shauck remarks that at the time the Dow law was passed, and for a half century before, there was a statute forbidding throughout the state the sale of intoxicating liquors to be drunk on the premises where sold; and that the growth of the business, notwithstanding the interdiction of the traffic, showed that, although unlawful, it continued to exist; and therefore the Dow law must be taken to apply to the facts as they existed, and that it was purposely drawn "in terms that admit of no exception."

The action of the treasurer is sustained, and upon sale of the property distribution will be made in accordance with these holdings.

Benton v. Carbonic Co.

CONTRACTS—SALE.

[Hamilton Common Pleas, 1908.]

W. K. BENTON v. STANDARD CARBONIC CO.

SALE OF BUSINESS EFFECTING DISCHARGE OF EMPLOYEE AND MATURITY OF NOTE GIVEN TO SECURE HIS POSITION.

Sale of that part of a corporation's business at the end of the first year for which it obtained a loan, giving its promissory note therefor, payable in two years without interest, on condition that the payer's son be given employment for an equal period of time without discharge, thereby compelling the son to retire, is equivalent to his discharge, and effects the maturity of the note for which judgment with interest from the date of sale will be rendered.

[Syllabus approved by the court.]

WOODMANSEE, J.

By agreement of counsel a jury was waived in this case. There is no dispute about the fact that on April 16, 1907, the plaintiff advanced to the defendant the sum of \$5,000, as evidence of which he took two notes of \$2,500 each, one payable in one year after date without interest and the other payable two years after date without interest. The first note was paid at maturity. The second note which is sued on in this case does not mature on its face until April 16, 1909. The evidence shows that at the time of the execution of these notes, and as a part of the consideration of the loan of the money without interest, was that the defendant agreed to employ M. H. Benton, son of the plaintiff, as "its agent for the sale of its carbonic acid gas automobile tire inflating apparatus for two years at \$50 per month and 20 per cent of the net profits." The contract also provides for what reasons the said M. H. Benton could be discharged.

There is no evidence that M. H. Benton was in fact discharged, but the testimony shows that the defendant sold out its business, or that part of its business which was placed in charge of M. H. Benton, and thereby ended his employment. Defendant claims that the said Benton resigned. This contention as the court views the evidence is not sustained. Doubtless Mr. Vorheis thought that what Mr. Benton did amounted to a resignation, but the court cannot come to that conclusion. The defendant was given the use of the money represented by this note for two years without interest solely for the purpose of giving employment to M. H. Benton, and when by its own acts the company made it impossible to give to him that employment, then such acts operated as a discharge of Benton and at the same time matured the note.

Plaintiff may have a judgment against defendant for the sum of \$2,500, with interest at 6 per cent from April 16, 1908.

Richland Common Pleas.

ATTORNEY AND CLIENT.

[Richland Common Pleas, November 23, 1908.]

Seward, Wickham and Nicholas, JJ.

*LOUIS C. MENGERT, IN RE.

1. GOOD CHARACTER MANDATORY IN LAWYERS.

Good character, as well as knowledge of the law, is among the necessary requisites for admission to the practice of the law; hence, the lawyer's relation to the public as an officer of the court gives the former the right to demand that he shall be honest, and it is the duty of the courts to enforce such conduct.

2. ORDER REQUIRING FINAL ACCOUNT TO BE FILED ESSENTIAL TO CHARGE AN ATTORNEY ACTING AS ADMINISTRATOR WITH UNPROFESSIONAL CONDUCT.

An administrator is not required to pay out money in his hands as such until final account is filed and distribution ordered; therefore, charges of unprofessional conduct involving moral turpitude cannot be predicated upon failure of an attorney, acting as an administrator, to pay accepted claims out of funds of the estate in his hands, in the absence of an order of the probate court requiring his final account to be filed.

3. FRAUDULENTLY OBTAINING MONEY OF CLIENTS AND MISAPPROPRIATION OF PROCEEDS OF COLLECTIONS CAUSE FOR DISBARMENT.

Collection of accounts of clients, without accounting for proceeds thereof; misappropriating moneys received by him in his capacity as attorney; falsely denying bringing of law suits and collection of judgments; inducing a trustee to loan him money belonging to a trust, constitute unprofessional conduct involving moral turpitude for which an attorney should be disbarred.

[Syllabus approved by the court.]

J. W. Jenner and L. H. Beam, for plaintiff:

Cited and commented upon the following authorities: *State v. Hand*, 9 Ohio 42; *Cotton v. Ashley*, 5 Circ. Dec. 6 (11 R. 47); *Palmer, In re*, 6 Circ. Dec. 179 (9 R. 55); *Palmer, In re*, 8 Circ. Dec. 508 (15 R. 94); *Lundy, In re*, 8 Circ. Dec. 111 (14 R. 561); *State v. Dirlam*, 75 Ohio St. 566; *Dirlam v. McBride*, 76 Ohio St. 594; *Percy, In re*, 36 N. Y. 651; ———, *an Attorney, In re*, 86 N. Y. 563; *Penobscot Bar v. Kimball*, 64 Me. 140; *People v. Cole*, 84 Ill. 327; *O———, In re*, 73 Wis. 602 [42 N. W. Rep. 221]; *Slemmer v. Wright*, 54 Iowa 164 [6 N. W. Rep. 181]; *Davies, In re*, 93 Pa. St. 116 [39 Am. Rep. 729].

J. P. Seward and H. L. McCray, for defendant.

SEWARD, J. (Orally.)

In the administration of the law in all civilized communities, the relation of attorney and client necessarily exists. The very relation demands such character in an attorney for honest and fair dealing, and for truthfulness in statements made to client or to the court, of which the lawyer is an officer, as will elevate him to a plane which is far above suspicion.

*Modified by circuit court, January 19, 1909, to suspension for two years.

Mengert, In re.

He occupies a confidential relation to his client, which calls upon him, in a peculiar and high degree, for honesty of purpose in matters confided to him by his client.

The client goes to him because he is in trouble; his rights, at least as he thinks, are about to be jeopardized. In and of himself, he is helpless. He seeks a lawyer—an officer of the court. He must, he does, have confidence in his integrity; he may know little of his legal attainments, but he must believe in his unblemished and unflinching integrity; and in using the word “he,” I use it in its generic sense, intending to include more especially women.

The requisites for admission to the practice of law are, knowledge of the law, and good character. I am impressed that too little importance is paid to the latter. The very definition of the word “law,” imposes a duty upon him who attempts to administer it, whether attorney or court, which demands unswerving honesty and truthfulness to client and court.

“Law” is defined as a rule of human conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.

So it is the duty of the lawyer to command what is right, and prohibit what is wrong. He is engaged in his profession in a holy and righteous calling, of enforcing the right and prohibiting the wrong, and he can, and will, do neither unless he himself is possessed of sterling integrity.

His relation to the public, as an officer of the court, gives the public a right to demand that he shall be honest. The public has a right to demand, and it is the court’s duty to enforce, honesty. A dishonest lawyer is as much out of place in a court of law as the devil would be in preaching the gospel of righteousness.

With these preliminary statements, we will proceed to an examination of the questions submitted to the court, and they are most important and demand the most solemn and careful consideration by the court, and we approach them impressed with the gravity of the matters involved.

On one side of the scale are the rights of clients; on the other, the lawyer’s profession and means of livelihood.

We reserved for consideration a demurrer to the second specification of the second charge, and to the fifth specification of the first charge. The second charge is, unprofessional conduct, involving moral turpitude. The second specification has reference to Mengert’s action as administrator of James Pearce’s estate. The gravamen of the specification is, that Carpenter presented to Mengert a claim against the Pearce estate; that he accepted the claim that he never paid the claim, nor any part of it, although he had funds with which to pay.

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Under the law, as we construe it, it is not the duty of an administrator to pay out money in his hands as such until a final account has been filed, and an order of distribution has been made by the court. It does not appear in the specification that a final account has been filed, or required to be filed. It does appear that Mengert was appointed in 1895. It is the duty of the court to order a final account to be filed. Why it has not so ordered, we are not able to conceive.

The demurrer may be sustained, and exceptions.

The demurrer to the McReady specification, being the fifth under the first charge, we think should be overruled.

Now, as to the first charge, that is: Misconduct in office as an attorney.

First specification. Stevens matter:

The Stevens boys employed Mengert in 1907, probably in July, to collect a claim against one Ritter, consisting of a check for \$65.50, and two accounts for \$32.40 each.

These claims were collected promptly by Mengert, according to his own statement, July, August or September; (pages 95-96 of his testimony) we think probably in July, and we think *he* should have been able to fix the date.

He claimed to these boys on one occasion that he mailed them a certificate, which we are satisfied he never did, and that he knew that he never did; that his statement, so made to them, was knowingly false, and that his statement on the stand in relation to that feature of the case was knowingly false. His claim is, that he mailed either a certificate of deposit or check to the wrong office; that is, that he mismailed it; that it was afterwards returned to him. He says that if it was a check, he tore it up; that if it was a certificate, it was in such shape that he could use it.

If it was a check, he might use it. If a certificate, to be valuable to the Stevens boys, it would be payable to them as payees, or made payable to them by endorsement. We are satisfied he did no such thing. If his claim, however, be true, how does his conduct in destroying the one, or using the other, comport with such honesty as is required of a lawyer?

Second specification. W. W. Stewart—Bucyrus matter:

This specification, in brief, charges that in June, 1908, (we think it should be on May 5 or 6, 1908,) W. W. Stewart employed Mengert to collect a note for \$225, from the maker, Albright, of Bucyrus, for a fee of \$10 and \$3—his expenses. That Mengert collected the amount and failed to account for more than \$140—probably should be \$145.

The facts disclosed are, that Mengert went over to Bucyrus on or about May 8, 1908; that Albright turned over to him, by endorsement, on that day, a certificate of deposit on the First National Bank of Bu-

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cyrus. This certificate bears the endorsement of Mengert; bears the stamp of the bank, where deposited by Mengert, of "paid;" on the same day, the bank which issued it stamps it "paid." He left the note with the bank for Albright to pay, and which he had promised to pay the following Saturday.

We are abundantly satisfied that Mengert secured this money on this certificate, on May 8. He credited the certificate on the note, as of that date; says he did not receive the money on the certificate and so informed his client.

When asked to give a reason for leaving the certificate with the bank, he, as a lawyer, confronts the court with the astounding proposition, as to why, he did not collect the money that, if the balance was not paid, he proposed to sue in common pleas court for the full amount, so as to avoid going before a justice. But, how would such an act comport with honesty? Albright had turned over the certificate, believing it was to be applied on his indebtedness. How could an attorney himself verify a petition, or permit his client to do so, when \$200 had really been credited on the note?

Stewart was demanding his money, and was informed that it had not been paid. Hahn and Stewart called up the bank and were informed that it had been paid. They confronted Mengert; he still insisted that it had not been paid.

Third specification. Ora B. Hale matter:

This has reference to a transaction for the sale of a farm, in which it is claimed that certain money went into the hands of Mengert, and that he failed to account for it.

It is quite evident that at least \$1,000, and probably \$2,000, went into the hands of Mengert, \$1,000 at least, in May, 1905. After receiving this \$1,000, he called upon Mrs. Hale, and paid her \$700, saying to her that that was all he had received. She called upon Mr. Davis, the attorney of the loan association, who furnished the money. She, with Davis, the next day, confronted Mengert with a statement indicating that \$2,000 went into his hands. Mrs. Hale says, that Davis asked him if he had not received this money, and he said, he had. It is admitted that, in addition to the \$700, Mengert paid \$250 and \$300, and other small payments. Mengert claims a large amount of fees since 1898 against Mrs. Hale. He never charged her with any fees, or credited her with any cash and says he kept no books. He misrepresented,—to put it mildly,—to his client the amount of money he received, and also failed to account to her for it.

Fourth specification. *A. M. Stewart v. Teeters*, to recover damages in a horse deal:

A. M. Stewart purchased a horse, January 20, 1906, and claimed that there was a breach of warranty; he says he saw Mengert from forty

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to sixty days after that, and placed the matter in his hands as attorney. Suit was brought by Mengert against Teeters shortly after and Mengert settled the case January 26, 1907. At that time, \$10 was paid him and the balance of \$40 was paid, June 21, 1907. On the appearance docket appears the entry: "Settled in full by payment by defendant of \$50 and costs, June 21, 1907. Douglass and Mengert, Attorneys for Plaintiff."

Stewart says, that in the latter part of the summer, Mengert kept putting him off; said he could not get it to trial. He talked to Teeters and learned that the case had been settled in the latter part of July, 1908, in a talk with Teeters.

Mengert in attempting to explain the entry on the appearance docket says: That he took Teeters' note, and the note had not been paid. We are forced to the conclusion that this is not true; that he received \$10 on the settlement, January 26, 1907, and the balance of \$40, June 21, 1907. He must have known that his claim that the case was settled by note was untrue. He gave his receipt to Teeters for \$10, on January 26, 1907, and one for \$40, dated June 21, 1907.

The next charge concerns the Demetree George transaction:

George was a Macedonian; had a power of attorney to collect a claim of \$500 against the Metropolitan Insurance Co. He employed Mengert to collect the claim. George was also an executor of one of his countrymen and he employed Mengert to look after, and collect this claim. They were collected in June or July, 1907; the funds in both cases. One hundred dollars of the \$260 was left with a bank, and certificate taken and left with Mengert in the safe. He loaned Mengert \$200 out of the \$500. Afterwards, Mengert came down to borrow more money and George says he told Mengert he had no money but the trust money.

A week after, George came down again, and told him he had no money; Mengert then mentioned the certificate, borrowed that money and gave him a check on the bank, which was not paid for want of funds.

In *Kirby, In re*, 10 S. D. 322 [73 N. W. Rep. 92; 39 L. R. A. 856], the court say, that everything done contrary to justice, honesty or good morals, is done with turpitude.

We think the borrowing of this money under such circumstances from his client, knowing it to be trust funds, and the subsequent acts of Mengert regarding it, was misconduct, involving moral turpitude.

So that we are unanimously of the opinion that the charges contained in the first five specifications under charge 1, have been abundantly sustained by the evidence; and also the first specification of the second charge.

It is essential that the source from which justice and righteousness

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is expected to flow should be kept pure and free from contamination or contaminating influences, this is essential in order to maintain the dignity of, and respect for the courts.

When the communities lose respect for the courts we are hard by the foundations of anarchy. The legal profession must purge itself of dishonest lawyers.

It is therefore ordered by the court that said Louis C. Mengert be removed from the office of attorney, and that he be not permitted to practice in the courts of Ohio.

Exceptions are noted.

CRIMINAL LAW—EVIDENCE—MANSLAUGHTER.

[Franklin Common Pleas, April 27, 1909.]

STATE OF OHIO V. DEL COLLINSWORTH.

1. MANSLAUGHTER NOT CONSTITUTED BY ACT OF NEGLIGENCE IN VIOLATION OF MUNICIPAL ORDINANCE.

To constitute manslaughter under Sec. 6811 Rev. Stat. the act of the accused, causing death, must be in violation of some state law; hence, a prosecution for manslaughter cannot be predicated upon a violation of a municipal ordinance as such.

[Syllabus approved by the court.]

C. T. Webber, R. W. McCoy, R. H. Game and W. E. King, for plaintiff.

E. C. Turner and J. A. Conner, for defendant.

KINKEAD, J.

On objection to the introduction of a city ordinance in support of an indictment for manslaughter, where the accused, in violation of the same, caused his vehicle to come into collision with a person, resulting in his death.

The previous action by another branch of this court does not embarrass the court.

In considering the objection interposed to the admission of the ordinance of the city of Columbus, a copy of which appears in the indictment, the rule that one judge shall follow the decision of another judge, even though the subsequent judge's opinion might be different from the other, is not involved. The judge, in overruling the demurrer, was compelled to do so because the indictment contained a charge of manslaughter independently of the charge of violation of the city ordinance.

The question involved here is of too great importance to warrant

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a trial judge by any judicial interpretation of statutes, penal in character, to make what seems to me an apparent extension beyond what has been determined by the Supreme Court.

The question is whether or not the violation of the city ordinance making it a misdemeanor in disregard of its provisions to cause a vehicle to come in collision with a person, constitutes involuntary manslaughter; whether or not Sec. 6811 Rev. Stat., properly construed, is sufficient to warrant the charge of homicide or of manslaughter for a violation of the ordinance in question. No fact is better understood in criminal law than that we have no common law crimes in Ohio. There was a time when the bar and the courts in Ohio believed and considered that there was in this state, under and by virtue of Sec. 6811, two classes of involuntary manslaughter. In *Weller v. State*, 10 Circ. Dec. 381 (19 R. 166), the circuit court reversed the common pleas in a case wherein it appears that the accused was simply exhibiting a weapon in a friendly way, and it accidentally went off, killing his friend; the common pleas court charged the law to be in that that act constituted involuntary manslaughter; the circuit court holding that there must be a violation of a penal statute in order to prosecute a crime of manslaughter. Judge Price, who delivered the opinion in the circuit court case, also delivered the opinion in the *Johnson v. State*, 66 Ohio St. 59 [63 N. E. Rep. 607; 61 L. R. A. 277; 90 Am. St. Rep. 564].

Ever since the opinion in *Johnson v. State*, *supra*, which was in 1902, I have thought it impossible and inadvisable for a trial court to assume the responsibility of holding that a violation of anything less than a state statute resulting in death, constitutes manslaughter. Some reference has been made to what has been done previously by members of this court in other cases. Be that as it may, there being some doubt in our mind just what the previous rulings were, I firmly believe that manslaughter as it has been defined by the Supreme Court, means that a party to be guilty must be guilty of violating some state law, which act causes death. By way of illustration, for instance, we may consider the violation of the state laws now regulating automobiles. If a man in running an automobile violates a state law, and, by reason of such negligent violation, runs into another and causes his death, in my judgment that would be an illustration of manslaughter within this statute, as defined by the appellate courts.

In the crime of manslaughter as it existed in common law, there were two classes of acts, *malum in se* and *malum prohibitum*. The unlawfulness of the act in law supplied the intention, and while we so frequently say as a general proposition, that no crime can be committed unless there has been an intent, it does not mean that there shall be an actual intent. The example mentioned of the violation of

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the state law regulating the rate of speed of an automobile, is an illustration of that rule. The unlawfulness of the act supplies the intent.

There is another very potent reason which may be advanced for sustaining the objection to the introduction of this ordinance, and it goes to the wisdom of the rule established in the two decisions by the Supreme and circuit courts, that the constitutional mandate is, it will be remembered, that all laws of a general nature must have a uniform operation within the state, and some very great men in times gone by, have discussed the injustice of making acts criminal by local laws within townships and municipalities. The very purpose of one provision of our constitution, as shown by the debates of the persons who took part in that convention, was to stop this matter of having a crime by a local law in one locality that was not a crime in another. For this reason it would be an unwise rule, in my judgment, to allow a crime of the grade of manslaughter to be predicated upon an ordinance that might be passed by any municipality in the state. You can readily see that we would have a crime of manslaughter in the city of Columbus, and it would not be a crime outside of the city at all. The village of Worthington might have an ordinance of a different sort, and it might lead to the charge of manslaughter, and it is not contemplated that any crime against the state of such a character shall be founded upon any such basis. And on that consideration, in addition to the other grounds that I have mentioned, I have come to the conclusion that the violation of this ordinance is what would have been a crime at common law, but which is not a crime within the laws of Ohio as they have been construed by the higher courts, and therefore the objection is sustained, and the ordinance will not be admitted.

There is another reason for this action. The rule is well settled that when seeking to hold anyone responsible in damages, civilly, by way of a charge of neglect for violating an ordinance, that the ordinance must be specially pleaded and proven as any other fact; and when it comes to the question of law when the court charges the jury, the ordinance is not conclusive upon the question of fact involved as to whether or not the violation of that ordinance in a particular case, is a negligent act. The violation of a statute is *prima facie* or *per se* an act of neglect, but this is not so in case of violation of an ordinance. The ordinance and the act of violation must be submitted to the jury. That is another reason for the inadvisability of extending this crime of manslaughter to the violation of a city ordinance.

Mr. King: The state will not go any further in the prosecution of this case, and the court can instruct the jury in accordance with the decision here, because there are no common law crimes in this state, and negligence however gross, cannot be a crime, and it must rest upon

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some statute or ordinance as we say, making that conduct penal. Consequently, if this is not a violation of the law, then this man is not guilty of any unlawful act.

The Court: Gentlemen of the jury, in view of the conclusion of the court upon the question of law involved, there is nothing for you to do under the instructions of the court, but to render a verdict acquitting the defendant. You will select one of your number as foreman, and a verdict will be handed to you, which may be signed and returned. There is no necessity to retire.

BILL OF EXCEPTIONS.

[Franklin Common Pleas, March 17, 1909.]

JACOB YAEKLE V. CHRISTIAN F. JAEGER ET AL.

BILLS OF EXCEPTIONS CANNOT BE WITHDRAWN FROM THE FILES PERMANENTLY. . . Bills of exceptions, under Sec. 5301, 5301a and 5302 Rev. Stat., as amended by act 96 O. L. 16, are original papers within the meaning of Sec. 6716 and, therefore, part of the record; where they are withdrawn from the files it is the duty of a court of common pleas to require their restoration; nor will the fact that a party has paid for a bill of exceptions afford him any right to permanently withdraw them from the files.

[Syllabus approved by the court.]

Pugh & Pugh, for plaintiff.

Huggins, Huggins & Johnson, for defendants.

BIGGER, J.

In this case a motion has been filed by counsel who are employed to prosecute another action against the defendant, as I understand the situation, and they ask for a bill of exceptions taken in this case and upon which error was prosecuted to the circuit court, and which bill has been withdrawn by the defendant from the files, to be restored to the files.

It was stated on the hearing of the motion that the movant desired to use the bill for some purpose. It seems that the case has been remanded to this court by the circuit court, so that the papers are now in the custody and under the control of this court.

It is the claim of the defendant that the bill of exceptions having been taken by the defendant and paid for by him, that the same is the private property of the defendant and that he has a right to withdraw the same and cannot be required to return it to the files.

The question presented is a somewhat novel one in practice. I do not see that a party in another suit has any right to the use of such a bill of exceptions which he can assert. But however that may be, I

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have no doubt that an officer of the court could by motion call the attention of the court to the fact that its files have been mutilated, and that in such case it would be the duty of the court, if the papers withdrawn are a part of the complete record of the case, to require the papers to be restored to the files. It is clearly the duty of the court to preserve its records. It is important to the rights of parties to suits in court that a record of the proceedings be preserved. The law contemplates that a complete record in each case shall be made and makes this duty mandatory upon the clerk, unless the same be duly waived. Where a complete record has not for any reason been made by the clerk, the original papers in the case may be used in lieu of such complete record. *Kinthead's Practice* 199; *Noble v. Shearer*, 6 Ohio 426, 427; *Sutcliffe v. State*, 18 Ohio 469 [51 Am. Dec. 459]; *Morgan v. Burnet*, 18 Ohio 535; *Stevison v. Earnest*, 80 Ill. 513.

But it is urged that the bill of exceptions is not a part of the record of the case. Until the amendment to the statute in 1902 of Secs. 5301, 5301a and 5302 Rev. Stat., it has always been held in this state that it was necessary to enter an order on the journal to make the bill of exceptions a part of the record. But the Supreme Court of this state has decided that the result of such amendment was to make the bill of exceptions an original paper within the meaning of Sec. 6716 Rev. Stat. and that a journal entry ordering such bill to be made a part of the record is not necessary in order to entitle it to be considered by the reviewing court. *Strauch v. Stoneware Co.* 71 Ohio St. 295 [73 N. E. Rep. 211].

The effect of this decision is that without an order making a bill of exceptions a part of the record, it is an original paper in the case and part of the record.

It does not seem to me that there is any force in the argument that because a party has paid for a bill of exceptions he is entitled to withdraw it permanently from the files. Parties pay for all the papers they file in the case. Furthermore, under the law of this state a motion may be made in the circuit court to vacate or modify the judgment rendered there for any cause stated in that statute, Sec. 5354, and in such case how would the court review the case if the bill of exceptions be withdrawn from the files? In case the court upon such rehearing should set aside its former judgment in this case and order a retrial of the action, then in case of the death of any witness who formerly testified, or his insanity or nonresidence, the statute, Sec. 5242a, authorizes the use of the bill of exceptions to prove the testimony of such dead, insane or absent witness, and it is only where no such bill of exceptions was taken that resort may be had to other evidence to prove what he testified to.

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As this is a question of practice it has been decided upon consultation with my associates, who unanimously concur in this decision. The bill of exceptions is therefore ordered restored to the files

COUNTERCLAIM—PLEADING.

[Stark Common Pleas, April 12, 1909.]

McCASKEY REGISTER CO. v. AMERICAN CASE & REGISTER CO. ET AL.

1. A CLAIM FOR UNFAIR COMPETITION MAY BE COUNTERCLAIMED BY A CLAIM FOR UNFAIR COMPETITION.

One corporation sued by another for unfair competition may counterclaim for unfair competition by the other; it is not necessary that such counterclaim arise out of a contract or transaction set forth in the petition, nor that such counterclaim be in existence at the time of commencing the action; it is sufficient that the counterclaim is connected with the subject of plaintiff's cause of action.

2. TRUTH OF FACTS ALLEGED IN PETITION NEED NOT BE ADMITTED TO ASSESS COUNTERCLAIM.

A defendant is not required to admit the truth of facts alleged in a petition as a condition precedent to maintaining a counterclaim.

[Syllabus approved by the court.]

This case was instituted by the plaintiff to recover damages in the sum of \$100,000 for alleged conspiracy on the part of the defendant company and its officers for disrupting and taking away the sales force of the plaintiff company; for constructing a register similar to the register manufactured by plaintiff and marketing it as the register of plaintiff company; for charging the plaintiff company with financial embarrassment and for using the advertising matter and testimonials of plaintiff company in the sale of defendant's register.

The defendant filed an answer and cross petition denying generally the facts set forth in plaintiff's petition and by way of cross petition seeks damages from the plaintiff company in the sum of \$200,000, charging an alleged destruction of its business by the plaintiff, unfair competition in following and embarrassing its salesmen and taking them away from defendant, making a cheap device similar to defendant's register, for competitive purposes, securing cancellation of defendant's contracts with its customers, sending letters and circulars to defendant's customers threatening them with infringement suits and publication of the petition filed in this case for competitive campaign purposes. The supplemental cross petition filed by defendant charges a continuation of the same wrongs on the part of the plaintiff since the filing of plaintiff's petition.

The questions involved are raised by a general demurrer filed by plaintiff to the cross petition and supplemental cross petition of the

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defendant; the other necessary facts are stated in the opinion of the court.

Lynch & Day, for plaintiff:

Cited and commented upon the following authorities. Sections 5067, 5069, 5076 Rev. Stat.

The defendant's cause of action set up in its cross petition and supplemental cross petition is not connected with the subject of plaintiff's action. *Evans v. Hall*, 12 Dec. Re. 222 (1 Hand. 434); *Needham v. Pratt*, 40 Ohio St. 186; *Donnegan v. Armour*, 2 Circ. Dec. 244 (3 R. 432); *Burkhardt v. Burkhardt*, 7 Dec. Re. 258 (2 Bull. 22); *Marshall Bros. v. Masson*, 13 Dec. Re. 771 (2 C. S. C. 66); *Dougherty v. Cummings*, 7 Dec. Re. 184 (1 Bull. 283); *Loomis v. Bank*, 10 Ohio St. 327; *Gelshenen v. Harris*, 26 Fed. Rep. 680; *Rogers v. State*, 23 Ind. 543; *Nolle v. Thompson*, 60 Ky. (3 Metc.) 121; *Barr v. Post*, 56 Neb. 698 [77 N. W. Rep. 123]; *Rothschild v. Whitman*, 132 N. Y. 472 [30 N. E. Rep. 858]; *Sheehan v. Pierce*, 70 Hun 23 [23 N. Y. Supp. 1119]; *Mulberger v. Koenig*, 62 Wis. 558 [22 N. W. Rep. 745].

Not only does the cross petition fail to allege any connection between the cause of action set up therein and the cause of action pleaded by plaintiff, but it denies such connection because by its general denial it denies the existence of all the material facts constituting plaintiff's right of action. 2 Bates, Pleading 1560; 7 Abbott's Practice 395.

The counterclaims must all be in existence at the time plaintiff's action was commenced. The supplemental counterclaim sets up facts occurring since the beginning of the action. *Ashley v. Marshall*, 29 N. Y. 494; *Vann v. Rouse*, 94 N. Y. 401; *Donnegan v. Armour*, 2 Circ. Dec. 244 (3 R. 432); *Gannon v. Dougherty*, 41 Cal. 661; *Paige v. Carter*, 64 Cal. 489 [2 Pac. Rep. 260]; *Fergus Print. & Pub. Co. v. Otter Tail Co. (Comrs.)* 60 Minn. 212 [62 N. W. Rep. 272]; *Orton v. Noonan*, 29 Wis. 541.

Hart & Koehler, for defendants:

Cited and commented upon the following authorities: Sections 4948, 5055, 5066, 5067, 5069, 5070, 5119 Rev. Stat.

A cross petitioner need not admit facts set out in plaintiff's petition before he can maintain counterclaim, but may deny them and still counterclaim. Sections 5067, 5315 Rev. Stat.; *Smith v. Minchell*, 6 Dec. Re. 1106 (10 Am. L. Rec. 484); *Wiswell v. Church*, 14 Ohio St. 31; *Hill v. Butler*, 6 Ohio St. 207; *Bradford v. Andrews*, 20 Ohio St. 208 [5 Am. Rep. 645]; *Lancaster, Ohio, Mfg. Co. v. Colgate*, 12 Ohio St. 344; Phillips, Code Plead. Secs. 261, 262.

The matter set up in defendant's cross petition and supplemental cross petition is a proper subject of counterclaim, as is shown especially by the later cases in Ohio as distinguished from the earlier ones; and

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it is the policy of the courts to consolidate litigation and avoid a multiplicity of suits. *Pacific Express Co. v. Malin*, 132 U. S. 531 [10 Sup. Ct. Rep. 166; 33 L. Ed. 450]; 25 Am. & Eng. Enc. Law 597; *Snow v. Holmes*, 71 Cal. 142 [11 Pac. Rep. 856]; *Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226 [19 Am. Rep. 278]; *Grimes v. Grimes*, 88 Ky. 20 [9 S. W. Rep. 840]; *Mogle v. Black*, 3 Circ. Dec. 27 (5 R. 51); affirmed, no report, *Black v. Mogle*, 51 Ohio St. 582; *Barkholt v. Wright*, 45 Ohio St. 177 [12 N. E. Rep. 185; 4 Am. St. Rep. 535]; *Swan's Plead. & Prec.* 259; *Cincinnati Daily Trib. Co. v. Bruck*, 61 Ohio St. 489 [56 N. E. Rep. 198; 76 Am. St. Rep. 433]; *Shoemaker v. Jackson*, 128 Iowa 488 [104 N. W. Rep. 503; 1 L. R. A. (N. S.) 137]; *McArthur v. Canal Co.* 34 Wis. 139; *Penn v. Hayward*, 14 Ohio St. 302; *Witte v. Lockwood*, 39 Ohio St. 141; *Morgan v. Spangler*, 20 Ohio St. 38; *Peter v. Foundry & Machine Co.* 53 Ohio St. 534 [42 N. E. Rep. 690]; *Needham v. Pratt*, 40 Ohio St. 186; *Woodruff v. Garner*, 27 Ind. 4 [89 Am. Dec. 477]; *Sheibley v. Dixon County*, 61 Neb. 409 [85 N. W. Rep. 399]; *Ashley v. Marshall*, 29 N. Y. 494.

The code provides for supplemental cross petition which may contain new matter arising since the beginning of suit. Sections 5119 and 5120 Rev. Stat.; *King v. Longworth*, 7 Ohio (pt. 2) 231; *Donnegan v. Armour*, 2 Circ. Dec. 244 (3 R. 432); *Sanfleet v. Railway*, 8 Circ. Dec. 711 (10 R. 460); *Howard v. Johnston*, 82 N. Y. 271; *Acer v. Hotchkiss*, 97 N. Y. 395; *Shannon v. Wilson*, 19 Ind. 112; *Lake Shore & M. S. Ry. v. Hutchins*, 37 Ohio St. 282; *Gibbon v. Dougherty*, 10 Ohio St. 365; *Potter v. Norwood*, 12 Circ. Dec. 146 (21 R. 461); *Weitzel v. Delhi*, 12 Circ. Dec. 737; *Glenn v. Hoffman*, 2 Dec. Re. 401 (2 W. L. Mo. 599); *Dickason v. Bank Co.* 27 O. C. C. 357 (6 N. S. 329).

AMBLER, J.

The question raised and argued on the demurrer of the plaintiff to the defendant's amended cross petition and supplemental cross petition must, as this court views it, be determined from the authorities in our own state. The authorities in other states are by no means uniform, and the tendency of our courts has been directly in conflict with the holdings in New York and many other states which have continued even under somewhat liberal codes, to follow more nearly the rules of the common law in authorizing the pleading of counter-claims.

The earlier cases in this state, decided since the adoption of the code, seem to tend toward the stricter rule of pleading in this regard, but I am of the opinion that all of the more recent cases tend toward greater liberality, in not only enabling, but also requiring, parties so far as practicable, to submit all their controversies for adjustment in a single action.

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This was announced to be the rule in *Needham v. Pratt*, 40 Ohio St. 186, cited by counsel for the plaintiff; and this principle has been followed, if not directly announced, in all of the decisions involving the right of counterclaim since that time, so far as I have been able to ascertain.

The rule, and the reasoning for the rule announced by Judge Swan in his work on Pleading and Precedents, which was adopted by the circuit court of Darke county in *Mogle v. Black*, 3 Circ. Dec. 27 (5 R. 51), as the basis for its decision in a case analogous to the one at bar, ought, as I believe, to control the decision in this case; as, in that case, in an action to recover damages for a tort, (an assault and battery), the defendant was permitted to counterclaim for damages for a tort, (a malicious slander) preceding and connected with the assault.

It is not necessary to quote from this decision, which was afterwards affirmed by the Supreme Court, without report, in *Black v. Mogle*, 51 Ohio St. 582.

To the same effect is the language of Judge Minshall in *Barholt v. Wright*, 45 Ohio St. 177 [12 N. E. Rep. 185; 4 Am. St. Rep. 535]:

"It would seem that under the code the right of each combatant to damages might be determined and measured in the same action."

In the *Cincinnati Daily Trib. Co. v. Bruck*, 61 Ohio St. 489 [56 N. E. Rep. 198; 76 Am. St. Rep. 433], our Supreme Court held where Bruck, plaintiff below, sued for libel, the Tribune company, defendant below, might counterclaim for damages for the malicious prosecution of a suit against it for dissolution and the appointment of a receiver, and said:

"If, however, the facts stated constitute a cause of action in favor of the defendant for the recovery of damages against the plaintiff for the malicious prosecution of the suit for the appointment of a receiver, it is very clear that they would constitute a counterclaim in this action. They are connected with the subject of the action; and this is sufficient to warrant their being pleaded as a counterclaim." Citing Swan's Plead. & Prec. 259, note.

It cannot, of course, be contended that the cause of action alleged as a counterclaim in this case arises out of a contract set forth in the petition, nor that it arises out of the transaction set forth in the petition; but is it not connected with the subject of plaintiff's action?

If an individual who has an altercation with another may counterclaim for damages for assault and battery in an action brought by the other for his assault upon him, why may not a corporation when sued by another for unfair competition, counterclaim for the unfair competition it claims the other has been guilty of? What distinction

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can be made between a commercial quarrel and a personal quarrel, in so far as the application of rules of pleading in this character of cases is concerned?

But, it is contended, that the defendant's answer, denying generally and specifically the material allegations of the plaintiff's petition, precludes it from setting up its affirmative defense by way of counterclaim. It may be that that is the rule in New York state as evidenced by the cases referred to by counsel for the plaintiff in Abbot's Practice reports; but as our courts have said, the New York holdings should not be regarded as a precedent in the light of holdings in our own state.

Section 5067 Rev. Stat. provides that the defendant may set forth in his answer as many grounds of defense, counterclaim or set-off as he may have, so long as they are not inconsistent with each other. And Sec. 5066 provides that the answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant; (2) a statement of any new matter constituting a defense, counterclaim or set-off.

The code, therefore, makes no limitation upon the joinder of defenses, except that inconsistent defenses shall not be joined; and courts have distinguished between inconsistency arising from a direct contradiction of facts averred, and that inconsistency which arises by implication of law. A defense of new matter involves an admission of the truth of the facts stated in the petition; but this is only for the purpose of that particular defense, and is not inconsistent with its being false in fact; and that it is false in fact may, under our code, be asserted in a separate defense in the same answer.

In other words, when a defendant can truthfully deny the allegations of a petition, he is not required to admit them to be true in fact as a condition upon which he may avail himself of new matter in defense. He may deny as one defense, but failing in that defense he is not precluded from proof of new matter which is itself a defense by reason of being the basis of an offset or counterclaim. In *Pavey v. Pavey*, 30 Ohio St. 600, it was held in an action upon a promissory note that defendant might deny execution and plead want of consideration and indeed *non assumpsit*, payment, and the statute of limitations have been held to be consistent defenses. These defenses would, at first blush, seem to be inconsistent; but can it be said that a denial of the plaintiff's cause of action is inconsistent with the assertion of the defendant's cross petition in the case at bar?

The defendant, in effect, says it denies the cause of action in plaintiff's petition, and requires proof thereof; but if the jury find otherwise, growing out of the same controversy, the industrial warfare

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between these two companies, it has the cause of action set forth in its cross petition, which it asks the jury to pass upon in determining the real controversies that exist between the parties in this case.

Nor do I see how any other ruling should apply to the demurrer to the supplemental cross petition. It avers a continuation since the filing of the amended cross petition of the same character of acts which each claims the other is guilty of. A continuation of the same claimed warfare, and therefore, to my mind, it is not properly the subject of a separate suit, in view of the fact that an action is now pending wherein the entire controversy between these parties may be adjudicated.

The demurrers to the amended cross petition and the supplemental cross petition will therefore be overruled, and exceptions noted.

APPEAL—EXECUTORS AND ADMINISTRATORS.

[Franklin Common Pleas, January, 1909.]

JEWIS SELLS, IN RE ESTATE.**1. APPELLATE JURISDICTION OF COMMON PLEAS TO DETERMINE RIGHT TO REMOVE EXECUTORS HELD NOT INCONSISTENT WITH EXCLUSIVE JURISDICTION IN PROBATE COURT.**

Exclusive jurisdiction in one court cuts off concurrent jurisdiction in another in the same matters; but the former is not inconsistent with appellate jurisdiction in the other court. Hence, the statutory right, conferred by Sec. 6407 Rev. Stat., of appeal to the common pleas from an order of the probate court removing an executor, does not conflict with Sec. 524, giving probate courts original exclusive jurisdiction to grant and revoke letters testamentary.

2. EXECUTOR REMOVED IS PROPER PARTY TO APPEAL FROM ORDER.

One removed as executor by order of the probate court has the right to appeal therefrom, notwithstanding such executor is not an heir, devisee or other person interested in the will.

3. INTEREST OF APPELLANT WILL NOT DEFEAT APPEAL PERFECTED ACCORDING TO STATUTE.

Compliance with Secs. 6408, 6409 Rev. Stat., as to perfecting an appeal from an order of the probate court removing an executor is sufficient, and it is immaterial whether appellant appeals in the interest of the trust or individually.

[Syllabus approved by the court.]

A. T. Seymour, J. Warren Keifer and H. J. Booth, for plaintiff:

W. H. Jones, W. G. Henderson and L. G. Addison, for defendant.

ROGERS, J.

This case stands on a motion to dismiss the appeal, based on five separate grounds, but which for the purposes of this decision may be grouped into three grounds, namely: That this court has no jurisdiction to hear the appeal; that the appeal was not taken by any person

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having a right to appeal; and that the appeal was not perfected according to law.

The order appealed from is one of July 13, 1908, by the probate court, removing Mary Green as executrix of decedent; and in the same order William F. Burdell is appointed her successor. The record shows that Mary Green was theretofore, on November 6, 1907, duly appointed and qualified,* and she acted as such executrix until her removal as above indicated. At the time of the order removing Mary Green as executrix, and as a part of such order, she gave notice of her intention to appeal, and the court fixed the amount of her bond at \$1,000. And on July 14, 1908, she again gave notice of her intention to appeal by filing such notice with the probate court, and on the same day gave her appeal bond, pursuant to the statute, in the sum of \$1,000, which was approved, and filed in the probate court.

As to the jurisdiction of this court: Article 4, Sec. 8 of the present constitution, provides:

"The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians * * * and such other jurisdiction * * * as may be provided by law."

The constitution contemplated that original jurisdiction in probate and testamentary matters should be confined to the probate court, but in nowise limited the jurisdiction in probate and testamentary matters exclusively to that court, so as to cut off appeal or error therefrom. If this were so, no order in the settlement of the accounts of executors, etc., could be appealed from. But both error and appeal have been prosecuted from such orders so often that the matter is no longer an open question. Hence, while it is intended that all probate and testamentary proceedings shall originate in the probate court, the constitution does not cut off the right of appeal or error, but has left to the legislature the right to confer by statute jurisdiction, either appellate or in error, on such other tribunals as it may deem expedient, to try anew or review the orders and judgments of the probate court. If, therefore, the statutes have conferred appellate jurisdiction on this court to try anew the questions, or any of them, involved in the order appealed from, I am unable to see how such statutes are in contravention of the constitution.

Have the statutes of this state conferred on the common pleas jurisdiction on appeal, of matters from the probate court, and, if so, do they cover the case at bar? The right of appeal is exclusively statutory, and if there is no statute, the right does not exist. By Sec. 6407 Rev. Stat. it is provided that the right of appeal may be had from an order of the

*See decision, *Sells, In re*, 52 Bull. 610.

Sells, In re Estate.

probate court removing or refusing to remove an executor, etc. And while Sec. 524 Rev. Stat. declares that the probate court shall have exclusive jurisdiction to grant and revoke letters testamentary, "except as hereinafter provided," it is only contemplated that the original jurisdiction shall be exclusive, and the section in nowise cuts off the right of appeal, wherever provision is otherwise made therefor. Exclusive jurisdiction of a court is not inconsistent with appellate jurisdiction of another court, of the same matter. When exclusive jurisdiction is vested in the former, concurrent jurisdiction of the latter is intended to be cut off; but the appellate jurisdiction of the latter need not be disturbed, even though the original jurisdiction of the former is exclusive. Besides, Sec. 524 Rev. Stat. contains the exception above indicated, which may refer as well to the appellate jurisdiction as to the concurrent jurisdiction, of other courts. But the more reasonable construction of the two sections mentioned is to limit Sec. 524 to cases wherein the probate court has exclusive original jurisdiction except in cases provided, and to confer by Sec. 6407 appellate jurisdiction on the common pleas in the cases mentioned, with others. Hence, I have arrived at the conclusion that by express statute, the court of common pleas has jurisdiction by appeal of an order removing an executor.

As to Mary Green's right to appeal: Besides Sec. 524 above mentioned, prescribing the jurisdiction of the probate court, Sec. 6017 confers upon the probate court the power to remove any executor, and Sec. 6407 gives the right of appeal from such order of removal. And it remains to determine whether the right so to appeal is given the appellant here.

Regarding appeals from the probate court: Section 6407 Rev. Stat. declares, that "appeals may be taken to the court of common pleas * * * from an order removing * * * an executor * * * by any person against whom such order * * * shall be made, or who may be affected thereby." The order in question was made against Mary Green in her capacity as executrix of decedent; and she was also affected by such order. The statute having designated who shall have the right of appeal, and among others, any person against whom such order shall be made, and the order having been made against her, the right of appeal was by statute vested in her by the plain and unambiguous language of the statute. Much is said about the appellant not having an interest as a party such as to give her the right to appeal. Interest cuts little figure, when the plain reading of the statute confers the right upon her. The statute does not require that she be a party in interest or any other interest than that the order be made against her. The statute then gave her all the interest needed to take the appeal.

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The order was both against her and she was affected by it, and when this condition arose her right under the statute to appeal attached.

Learned counsel have also discussed at length the statutes pertaining to proceedings in error, and seek by analogy to draw the inference that the court would arrive at the same conclusion with reference to appeals. But such analogies have but little force in the face of the plain language of the statutes governing appeals from the probate court. When the statute is clear, there is no occasion to resort to inferences to be drawn from analogous proceedings. Furthermore the statutes, under which many of the cited cases were rendered, have been changed, and the decisions have little force when applied to the amended statutes. Relying upon the ordinary meaning of the words used in the statute, and not straining them by construction, in order to exclude persons from appealing from an order, I am convinced that Sec. 6407 gives the right of appeal to the appellant, she being the executrix under decedent's will, even though she may not be shown by the record to be an heir, devisee or other interested person under such will.

As to perfecting the appeal: Sections 6408 and 6409 Rev. Stat. provide the proceeding necessary to perfect the appeal, and an examination of the record and the file mark on the transcript discloses that the appellant has complied with both sections, whether she has appealed in the interest of the trust or individually. She gave both the bond and the notice required by the statute; and I am unable to see any irregularity in making the appeal complete.

It is of little consequence whether the order of the probate court is suspended, or vacated by the appeal. If the right of appeal is given, this right is not abridged in either event.

The motion to dismiss the appeal is, therefore, overruled.

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ADULTERATION—INJUNCTION.

[Franklin Common Pleas, July 13, 1908.]

SMITH AGRICULTURAL CHEM. CO. V. CALVERT ET AL.**1. SECRETARY OF STATE BOARD OF AGRICULTURE ENJOINED FROM INSPECTING COMMERCIAL FERTILIZERS.**

A temporary injunction will lie to restrain the state board of agriculture and its secretary from enforcing the provisions of Sec. 4446a Rev. Stat. *et seq.*, requiring samples of commercial fertilizer to be filed for analysis, certification of contents of packages, payment of license, permitting the taking without compensation of samples from packages exposed for sale, authorizing the publication of annual reports of such inspection and prescribing penalties for the violation thereof, for the purpose of preventing vexatious litigation, multiplicity of civil, criminal and quasi-criminal suits pending the determination of the constitutionality of the act, especially where the attempt to enforce the act may seriously impair or even wreck a manufacturer's business and no loss other than may be compensated in money will result to such board.

2. FRAUD FROM RESTRAINING INSPECTION OF MANUFACTURED PRODUCTS NOT PRESUMED.

A manufacturer of commercial fertilizers, objecting to the enforcement of Sec. 4446a Rev. Stat. *et seq.*, providing for the inspection thereof, will not be presumed upon a temporary injunction being granted to perpetrate fraud upon its customers by selling spurious products in view of the competition among manufacturers of such fertilizers, the publicity given such matters and other legal remedies available to purchasers and the board of agriculture.

[Syllabus approved by the court.]

Addison, Sinks & Babcock, for plaintiff.

O. A. Harrison, S. W. Bennett and B. D. Huggins, for defendants.

ROGERS, J.

The case stands on the plaintiff's application for a temporary injunction. As appears from the amended petition, the plaintiff is and has for a long time been engaged in importing materials for, and manufacturing and selling throughout this and other states, fertilizer, and has invested large sums of money in its plant, and has built up an extensive trade with large moneyed interests invested therein. The defendants threaten to enforce the statutes regulating the manufacture and sale of commercial fertilizer against the plaintiff, if it does not comply therewith, and the enforcement of these statutes, plaintiff claims, will result in the destruction of its property rights and ruination of its business. And these statutes, as well as the statutes under which defendants claim to hold their respective positions, are charged to be void as being in contravention of the state and federal constitutions. Wherefore it prays for a permanent injunction prohibiting such enforcement of the fertilizer laws against it, and of doing acts under said laws in

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impairment of plaintiff's property rights, including the publication of reports or statements reflecting upon the plaintiff's right to do business, or interfering with the conduct of its business; and it also prays for a temporary injunction to preserve the *status quo* until the question of right between the parties can be decided on final hearing.

A large number of affidavits by the respective parties have been filed for and against the allowance of such temporary injunction. A large part of the evidence contained therein is entirely foreign to the subject before the court on this hearing. In some particulars the amended petition is denied by the defendants; but so far as the enforcement of the fertilizer statutes is concerned, the amended petition practically remains admitted.

The statutes concerning the regulation of the fertilizer business in Ohio are contained in Secs. 4446a to 4446i, and 7002 Rev. Stat. The statutes require, among other things that, before any sale of fertilizer, a certificate shall be affixed on the outside of each package stating the number of pounds, the name or trade-mark, the name of the manufacturer, and the place of manufacture, and a chemical analysis of certain ingredients, and that a certified copy of such certificate shall be filed, and a sealed glass jar containing a sample of not less than one pound of fertilizer shall be deposited with the secretary of the Ohio State Board of Agriculture, with an affidavit that such jar contains a fair sample; that the manufacturer, or importer or agent shall pay annually, on May 1, a license of \$20 on each brand to said secretary, "for the privilege of selling or offering for sale within the state;" that all analyses of fertilizer shall be made annually by or under direction of said secretary, and paid out of funds derived from license fees; that said secretary shall publish annually a report of such analyses, and moneys received and expended therefor, and the surplus shall be placed to the credit of the agricultural fund; that any person offering or exposing for sale, or selling fertilizer without complying with Secs. 4446a to 4446c Rev. Stat., or permitting an analysis to be attached to any package stating a larger percentage of the constituents than it really contains, shall be subject to a penalty of not less than \$200 for the first, and not less than \$500 for every subsequent offense, to be recovered by civil action brought by said secretary in the name of the state, and the penalties recovered shall be paid into the state treasury to the credit of the general revenue fund; that said secretary, or any person by him deputed, is empowered to select from any package of fertilizer exposed for sale, not to exceed two pounds, for the purpose of analysis and comparison with the certificate and the samples deposited with said secretary. Besides there is a criminal statute, Sec. 7002 Rev. Stat., providing a punishment for noncompliance with the first three of the above named sections.

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Many grave and difficult constitutional questions concerning the validity of the present fertilizer statutes are raised by the amended petition. Some of them are:

(1) Whether the prerequisite requirement that the license fee of \$20, annually, on each brand, shall be paid by the manufacturer, etc., "for the privilege of selling or offering for sale within the state," is or is not violative of Art. 1, Sec. 8, of the constitution of the United States conferring upon congress power to regulate commerce among the several states.

(2) Whether the power vested in the secretary, or any person deputized by him, to select from any package exposed for sale a quantity not exceeding two pounds, for analysis and comparison with the sample deposited with the secretary, is or is not an arbitrary and discriminatory exercise of police power amounting to a taking of property without due process of law, and in the impairment of property rights protected by the fourteenth amendment of the United States.

(3) Whether the exercise of the power last named is or is not a clear violation of the bill of rights, as well of the constitution of Ohio as of the United States, declaring the right of property to be inviolate and prohibiting the taking of such property for public use without just compensation; for clearly if it cannot be taken for public use without compensation, it cannot be taken for private use, nor could it be taken were there no constitutional provision on the subject. See *Reese v. Wood Co. (Treas.)*, 8 Ohio St. 333, 345; *Shaver v. Starrett*, 4 Ohio St. 494, 498.

(4) Whether the said license fee is or is not a tax, levied in contravention of the Ohio constitution.

(5) Whether the fertilizer law as it now exists, and which had no force and was void, in that it sought to confer the exercise of public functions upon the secretary of the former board, which has been held by this court to be without authority in the premises, is or is not revived by the new act of May 1, 1908, creating the present board, so that what was an inoperative and void statute as to the former secretary is made operative and valid as to the present secretary. The act of May 1, 1908, so far as conferring power and imposing duties on the secretary with regard to the present fertilizer law, is a complete blank. While it confers powers on the new board, it confers none on the secretary; and whether it can be said that the present fertilizer statute which was void and had no force, because it conferred powers on a person, not a state officer, to perform sovereign functions, now becomes operative by the appointment, under a new legislative act, of a secretary, who was not contemplated by the present fertilizer law, is, to my mind, a novel and intricate question.

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These are some of the problems to be solved, before the present secretary can safely attempt enforcement of the fertilizer statutes. Notwithstanding the serious legal obstacles confronting defendants in the proper enforcement of the fertilizer statutes, vexatious litigation and a multiplicity of suits, both civil, criminal and quasi-criminal are threatened by them as against the plaintiff, and its agents, which are liable to cause immediate, certain and great pecuniary loss, expense and hardships to plaintiff, and result in irreparable injury. And the object of the preliminary injunction applied for is to prohibit the invasion by defendants of plaintiff's rights of property by the enforcement of the alleged unconstitutional law, until its right to a permanent injunction may be fully heard and determined by the court. That a permanent injunction will be decreed to prohibit the invasion of such rights is too well settled to need authorities in support of the proposition. Among some of them, however, are: *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217 [23 Sup. Ct. Rep. 498; 47 L. Ed. 778]; *Dobbins v. Los Angeles*, 195 U. S. 223, 241 [25 Sup. Ct. Rep. 18; 49 L. Ed. 169]; *Hutchinson (City) v. Beckham*, 118 Fed. Rep. 399, 402 [55 C. C. A. 333]; *Greenwich Ins. Co. v. Carroll*, 125 Fed. Rep. 121, 126; *Camden Interstate Ry. v. Catlettsburg*, 129 Fed. Rep. 421, 430.

The question remaining is to whether the court is authorized to grant a preliminary injunction in the case made, even where the questions involved are those of law, namely, the constitutionality of the legislative acts, or any of them, challenged by the plaintiff in its amended petition. A preliminary injunction is a provisional remedy, and, as far as possible, it is allowed or disallowed, as the case may be, without the intention on the part of the court of forecasting what may be the final decree on full hearing. And on the question of allowing such an injunction the relative rights of the parties, and the injury to each by its allowance or disallowance are proper matters for consideration. The rights and duties of the defendants, and especially the secretary of the board, are to enforce the fertilizer laws, if constitutional, by requiring the payment of license fees, the deposit of samples of the various brands of fertilizer, the inspection and selection of samples of fertilizer on sale, the publications of analyses of fertilizer, etc., the recovery by suit of license fees and penalties for noncompliance with the law, and other incidental duties imposed by statute. These rights and duties, if not enforced as to the plaintiff until a full hearing may be had, will entail no loss to the defendants other than what may be compensated by money, and may be protected by proper bond. Whereas, if the defendants be permitted to enforce the fertilizer statutes against the plaintiff to the extent warranted by their letter, (and the court must presume that the defendants will perform their respective

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duties in the premises), such enforcement is liable to result in a complete wrecking of plaintiff's business, and heavy loss of its property. Whether the plaintiff will or will not put in a spurious article of merchandise on the market—a matter seriously disputed by the plaintiff—and thereby perpetrate frauds upon customers, they have their remedies against the plaintiff, whether the fertilizer law is or is not enforced by the defendants. The presumption is that the plaintiff will not commit such a fraud; and, besides, the publicity already given these matters in dispute and the competition among dealers ought to prevent any serious fraud being practiced upon customers. Furthermore the prevention by a preliminary injunction of the enforcement by the defendants as against the plaintiff of the fertilizer statutes in no ways interferes with the rights and duties of the board and its members in all other matters lawfully imposed upon them. And unless other manufacturers and dealers in fertilizer see fit to prevent the enforcement of these statutes, the board may, at its peril, enforce the statutes as against them.

The situation, therefore, presents a question of the relative convenience or inconvenience to these parties by the allowance or disallowance of a temporary injunction, and I am satisfied that the discretion of the court should be exercised in favor of allowing a temporary injunction, if it can be allowed when purely questions of law are involved, and especially constitutional questions. It is the law that whenever the questions of law or fact to be ultimately determined in an equity suit are grave and difficult, a preliminary injunction to maintain the *status quo* may properly issue, especially where the injury to the moving party will be immediate, certain and great, if it is denied, while the loss or injury to the opposing party will be comparatively small and insignificant, if granted. See *Newton v. Levis*, 79 Fed. Rep. 715 [25 C. C. A. 161]; *Denver & R. G. Ry. v. United States*, 124 Fed. Rep. 156 [59 C. C. A. 579]; *Harriman v. Northern Securities Co.* 132 Fed. Rep. 464.

If a case involving grave and intricate questions of law entitles the plaintiff, in a proper case, to a preliminary injunction, I am unable to see why the fact that they may be constitutional questions should make any difference in the rule. Although the constitutionality or unconstitutionality of a legislative act is a pure question of law, I am of opinion, that, in a proper case, where such questions of law only are to be determined by court, it will grant a preliminary injunction to preserve the *status quo*, in order that the court may ultimately determine the rights of the parties. Frequent examples of such injunctions may be found in street assessments and tax cases, and many other classes of cases might be cited. In fact, the only feasible way to settle like questions to those at bar is by first allowing a temporary injunction, in order

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to give the court time to deliberate upon the intricate legal questions involved and arrive at a just conclusion. And this is especially so, where by staying the hand of the defendants comparatively small damage will be done, whereas by allowing the defendants, without limit, to pursue the plaintiff under the statutes, irreparable injury would result, causing wreck and ruin of property rights.

I have gone into the questions raised by the plaintiff's pleading far enough to convince me that the defendants' rights in the premises are not free from doubt, in the several particulars heretofore pointed out. On the contrary, the case made by the amended petition presents strong claims for equitable interference, and the plaintiff's course in seeking an injunction is highly proper to test the question involved. As was said in the opinion in the *Hutchinson (City) v. Beckham, supra*, "the complaint" * * * "may be appropriately termed 'a bill of peace.'" It is filed to obtain a definite determination that the fertilizer statutes complained of are void; also to prevent harassing litigation and to establish the plaintiffs' rights to transact its business without complying with the alleged void statutes. While the court will not undertake to determine the ultimate rights of the parties, it is sufficient to say that a fair question is raised as to the existence of the right of the plaintiff to the injunction demanded, and it makes a case of probable right justifying the preservation of the plaintiffs' property in *statu quo* during the pendency of the statute, and until the case can be deliberately heard and finally determined upon the issues.

The right of the defendants, and especially the secretary, under the fertilizer statutes, to take the plaintiffs' property without compensation, and to compel the payment annually of a license fee for the privilege of selling, where plaintiff is doing a local and interstate business, has the appearance of an unlawful exaction from plaintiff which it at least should have the right to have determined before its property rights are seriously impaired by noncompliance with the statutes. The court recognizes the right of a state to enforce inspection laws, to charge fees therefor, and to impose penalties under the same; but I am unable to see without further enlightenment, in such a case as this, how the state can take property or can abridge the privilege of selling without interference with the due process clause and the interstate commerce clause respectively of the United States constitution, as well as with the constitution of the state. The case of the *Southern Express Co. v. Ensley (Mayor)*, 116 Fed. Rep. 756, is instructive on the subject of the state's interference with interstate business, and involves the principles in case at bar.

The matter remaining is as to the extent of the preliminary injunction. The court is of the opinion that a preliminary injunction should

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be allowed restraining and enjoining the defendants and each of them from collecting or seizing any of the goods manufactured, owned or sold by the plaintiff, or from entering upon the premises where same are stored, from drawing any samples, therefrom, from requiring or compelling or attempting to require or compel the plaintiff to pay said license fees for said brands, from preparing, publishing, or circulating any bulletin, pamphlet, or report, or statement, under or by virtue of their claim of authority as members, or secretary of the said state board of agriculture, as or such board, reflecting either directly or indirectly upon, or injuriously impairing the plaintiffs' right to prosecute or conduct its business, and from in any wise interfering with the plaintiffs' said business on account of its refusal to pay said license fees or otherwise comply with said acts of the legislature, and it is so ordered.

Exception by the defendants.

APPEAL—EXECUTORS AND ADMINISTRATORS.

[Hamilton Common Pleas, April, 1909.]

WILLIAM W. SCOTT, IN RE ESTATE.

APPEAL LIES TO DETERMINATION OF WIDOW'S MARRIAGE TO DECEDENT ON EXCEPTIONS TO INVENTORY.

Determination of the fact of marriage to decedent to entitle a widow to a year's allowance under Sec. 6040 Rev. Stat. is properly raised on exceptions to the inventory setting aside such allowance and, under Sec. 6024 Rev. Stat., appeal lies to the finding of the probate court thereon.

MOTION to dismiss appeal.

W. A. Hicks and G. W. Cormany, for the motion.

L. J. Hoppe, contra.

HUNT, J.

The setting aside of an allowance to the widow for first year's support is a part of the duty of the appraisers in making the inventory of the estate, and while an increase or decrease in such allowance is specially provided for by statute, the determination of the question as to whether the person claiming to be the widow is in fact the widow to which such allowance should have been made, can be raised upon an exception to the inventory, and the finding of the probate court upon such exception is appealable to the court of common pleas under Sec. 6024, Rev. Stat.

The motion to dismiss the appeal is therefore overruled.

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CHattel MORTGAGES—EVIDENCE—INTOXICATING LIQUORS.

[Hamilton Common Pleas, April 14, 1909.]

CARRIE KING v. C. C. RICHARDSON, AUD., ET AL.

MARGARET HALL v. CHARLES E. ROTH.

1. INJUNCTION AGAINST COLLECTION OF TAX UPON TRAFFICKING IN INTOXICATING LIQUORS IN IMMORAL RESORTS.

Act 91 O. L. 300 (Lan. Rev. Stat. 7240 to 7247; B. 4364-1 to 4364-8), prohibiting sales of intoxicating liquors in houses of ill-fame and prescribing punishment for violation thereof, and act 88 O. L. 567 (Lan. Rev. Stat. 10596; B. 6943-5) prohibiting sales in brothels, indicate the intention of the legislature to prevent such acts rather than by employment of married men as inspectors of the state dairy and food department to ensnare and induce such keepers and inmates to violate these laws, for the purpose of squeezing revenue from them.

2. SALES OF TWO BOTTLES OF BEER NOT PRESUMPTION OF BEING ENGAGED IN BUSINESS OF TRAFFICKING IN INTOXICATING LIQUORS.

A sale of two bottles of beer at more than the usual price, by a woman in her rooms to two inspectors of the state dairy and food department does not raise the presumption that other like sales were made by her and so constituting her engaged in the business of trafficking in intoxicating liquors within the meaning of the Dow tax law.

3. EVIDENCE OF MARRIED MEN ENSNARING IMMORAL WOMEN NOT ENTITLED TO GREATER CREDENCE THAN THEIR VICTIMS.

Married men employed by the state dairy and food department to entice street walkers into houses of assignation and ensnare them and keepers of houses of ill-fame into the unlawful sale of intoxicating liquors are not entitled to greater credence than a woman against whom they have laid an information with the state auditor for selling two bottles of beer, especially where she denies their presence in her rooms and the sales to them and they are unable to identify her in court as the person selling to them.

4. ENTRY UPON TAX DUPLICATE NOT PRIMA FACIE PROOF OF TRAFFIC IN INTOXICATING LIQUORS.

An entry upon the tax duplicate of an assessment for the Dow tax, in an action to restrain its collection, is not *prima facie* proof, within the meaning of Sec. 1104 Rev. Stat., that the person charged is engaged in the business of trafficking in intoxicating liquors where such entry is erroneous and based on information of inspectors; but such fact must be established by the evidence adduced on the trial thereof.

5. HOUSEHOLD GOODS COVERED BY CHATTEL MORTGAGE NOT DISTRAINABLE FOR DOW TAX.

Household goods, such as beds, chairs, carpets, etc., covered by chattel mortgage are not such goods and chattels as are used in the business of trafficking in intoxicating liquors and as such cannot be distrained for non-payment of the Dow tax, as against the mortgagee in good faith.

[Syllabus approved by the court.]

W. M. Tugman, for plaintiff.

Alfred Bettman, for defendants:

Cited and commented upon the following authorities. *University Club v. Ratterman*, 2 Circ. Dec. 11 (3 R. 18); *Müller v. State*, 3 Ohio

King v. Richardson.

St. 475; *Harris v. State*, 50 Ala. 127; *Warren v. Shook*, 91 U. S. 711 [23 L. Ed. 421]; *Markle v. Newton*, 64 Ohio St. 493; *United States v. Bonham*, 31 Fed. Rep. 808; *Pioneer Trust Co. v. Stich*, 71 Ohio St. 459 [73 N. E. Rep. 520]; *Taylor v. State*, 121 Ala. 24 [25 So. Rep. 689]; *State v. Wadsworth*, 30 Conn. 55; *Evans v. State*, 54 Ark. 227 [15 S. W. Rep. 360]; *Barnes v. State*, 20 Conn. 254; *Corley v. State*, 87 Ga. 332 [13 S. E. Rep. 556]; *Commonwealth v. Bickum*, 153 Mass. 386 [26 N. E. Rep. 1003]; *Munoz v. State*, 40 Tex. Crim. Rep. 457 [50 S. W. Rep. 949]; *State v. Beloit*, 74 Wis. 267 [42 N. W. Rep. 110]; *Mack v. State*, 116 Ga. 546 [42 S. E. Rep. 776; 94 Am. St. Rep. 137]; *Bilups v. State*, 107 Ga. 766 [33 S. E. Rep. 659]; *Hinkle v. Commonwealth*, 23 Ky. Law Rep. 1979 [66 S. W. Rep. 1020]; *State v. Morton*, 42 Mo. App. 64; *State v. Hassett*, 64 Vt. 46 [23 Atl. Rep. 584]; *Willis v. State*, 37 Tex. Crim. Rep. 82 [38 S. W. Rep. 776]; *Hartgraves v. State*, 43 S. W. Rep. 331 (Tex. Crim. Rep.); *Paschal v. State*, 84 Ga. 326 [10 S. E. Rep. 821]; *Grant v. State*, 87 Ga. 265 [13 S. E. Rep. 554]; *State v. Buck*, 37 Vt. 657; 1 McLain, Crim. Law 233.

GORMAN, J.

This is an action to enjoin the auditor and treasurer of Hamilton county from collecting by distress on the goods and chattels of plaintiff, \$316.46, claimed to be due on account of the tax assessed for the business of trafficking in intoxicating liquors at No. 210 West Eighth St. in Cincinnati.

Plaintiff is shown to be the owner of said house, 210 West Eighth St.

There is an entry on the liquor tax duplicate of Hamilton county for the year 1908 as follows:

“Carrie Earl, 210 East Eighth Street, Ward Six, Commencing business February 19, \$263.72.”

Plaintiff's property wherein she resided on February 19, 1908, is in the Ninth ward of said city, 210 West Eighth St. and not in the sixth ward, the distance between the two numbers being more than four city squares.

The evidence of the two inspectors, Bamber and Dennis, is to the effect that on February 19, 1908, they went to a house, No. 210 West Eighth St., and asked for Carrie Earl; that a woman came to the door and admitted them, and said she was the landlady, Carrie Earl. The inspectors asked for a quart bottle of beer each and they were brought to them in a short time for which they each paid twenty-five cents and in a short time thereafter they left the house. This occurred between 9 and 9:40 o'clock at night. Neither of the inspectors had ever seen the woman before or been in that house previous thereto. It was appar-

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ently a private dwelling house, but in reality either a house of ill-fame or an assignation house, perhaps the latter. The plaintiff was in court but the inspectors failed to identify her as the person who admitted them into the house or who brought them the beer.

The plaintiff testified that she never sold or gave any beer to the inspectors on said night; that she kept no beer in her house and never sold any beer therein. The inspectors said they would not know the woman who let them into the house or the woman who brought the beer. They came from up in the state where their homes are and were here in Cincinnati to get evidence against persons conducting houses of ill-fame and assignation houses engaged in the business of trafficking in intoxicating liquors, so as to charge them with the payment of the tax. They were given the name of Carrie Earl, 210 West Eighth St. among other places to visit. When going to an assignation house, their custom was to "pick up" street walkers, or women on the street who were out to ply their trade. In this case the inspectors picked up two women, went to the house of plaintiff, hired and paid one dollar each for a room and procured or bought the beer as before stated. All this expense is charged up to the state of Ohio.

Now it is contended that the entry above set out on the duplicate makes out a *prima facie* case against plaintiff. Section 1104 Rev. Stat. provides that a certified copy of the entry on the duplicate shall be *prima facie* evidence on the trial of the amounts, validity and non-payment of said taxes. But if the evidence discloses that the entry on the duplicate is erroneous, as it was in the case at bar, at least there was no entry against Carrie Earl or Carrie King, 210 West Eighth St., Ninth Ward, and that being the place, where it is admitted and shown that Carrie Earl or Carrie King resided and where it is claimed the business was carried on, this entry cannot be *prima facie* evidence of the fact that Carrie Earl was engaged in the business of trafficking in intoxicating liquors at any other place than 210 East Eighth St., Sixth Ward.

The question then arises, Was plaintiff under the name of Carrie Earl engaged in the business of trafficking in intoxicating liquors at 210 West Eighth St., Ninth Ward of Cincinnati, on February 19, 1908?

In the opinion of the court the defendant's case is not helped or made out by the entry on the duplicate for the reasons stated, and the case must stand or fall on the evidence of the inspectors and the plaintiff together with the surrounding circumstances, and unaided by the entry on the duplicate. It is true, as counsel for defendants contend, that the treasurer may proceed to distrain and collect without making an entry on the duplicate, by virtue of Sec. 4364-12 Rev. Stat., but it must appear that the person whose property is about to be

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seized on distress, is or has been engaged in the business—admitting for the sake of the argument that the testimony of the two inspectors is undisputed. I am of the opinion that the procuring of the beer in the house of the character which plaintiff is shown to have been conducting and in the way this beer was procured does not show that plaintiff was carrying on the said business.

The presumption, if there is a presumption to be indulged in, would be against that fact, because such sales are prohibited in such places under severe penalties under Secs. 4364-1 to 4364-8 and Sec. 6943-5 Rev. Stat., and there would be in a criminal case under these sections a presumption of innocence until the fact of guilt were shown. In this connection it seems to the court that the state which prohibits under severe penalties the traffic in intoxicating liquors, even the giving away thereof in such places as houses of ill-fame and assignation houses, can hardly be justified in employing agents in the revenue department and for the purpose of raising revenue to tempt and induce the keepers of such houses to violate the law in order to enable the state to profit by the act of violating a law intended to minimize the evils connected with such houses. There is no equity or justice in allowing the state to profit by employing and paying agents to bring about a violation of some of its most salutary laws. Perhaps the fault lies in our bad system of taxation, whereby the state seems to be willing to reach out by the hand of the tax gatherer and lay hold of any thing, object, business or calling which will enable it to raise revenue regardless of any moral question that might be involved in the levying and collecting of taxes.

I am of the opinion that the evidence in this case does not show that the plaintiff was engaged in the business of trafficking in intoxicating liquors at the times claimed by defendants, and that the two sales claimed to have been made do not constitute the carrying on of the business; and unless the court is to presume from the fact that these two sales were made, that it was the customary practice to make sales in plaintiff's house, then it appears to the court that the evidence does not support the defendant's contention that plaintiff was engaged in said business.

In *University Club of Cincinnati v. Rattermann*, 2 Circ. Dec. 11, 13 (3 R. 18), our circuit court held, using the language of Judge James M. Smith:

“It was hardly the intention of the legislature to make persons or corporation liable to assessment for a single sale of liquor, or it may be for two or three isolated sales—but to require those who do it habitually, to pay the tax therefor.”

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To the same effect is the opinion of Judge Rufus B. Smith in the case of *Voss & Co. v. Hagerty*, 11 Dec. Re. 408, 409 (26 Bull. 268) :

"But while the tax must be paid by every person, * * * for each place where the traffic in intoxicating liquors is carried on, the law does not require a separate tax to be paid for every place where a sale is made, unless the sale in such place is in pursuance of a 'business' carried on in that place. The tax is not upon a single sale, but upon the 'business' of 'buying and selling' or 'procuring and selling.' An occasional sale at a place by an agent who does not transport the liquor to the place, but solicits the sale of the liquor located in another place, does not of itself necessarily subject the principal to an additional tax in that place."

Citing with approval *University Club of Cincinnati v. Rattermann*, *supra*, and quoting the above language of Judge J. M. Smith.

See also, *Miller v. State*, 3 Ohio St. 475, 476, 488, 489; *Harris v. State*, 50 Ala. 127, 130; *Warren v. Shook*, 91 U. S. 711 [23 L. Ed. 421]; 21 Am. & Eng. Enc. Law (2 ed.) 811; *Weil v. State*, 52 Ala. 19; *United States v. Kenton*, 2 Bond 97 [26 Fed. Cas. 763]; *Merced Co. v. Helm*, 102 Cal. 159, 168, 169 [36 Pac. Rep. 399]; *State v. Barnes*, 126 N. C. 1063 [35 S. E. Rep. 605]; *Stanford v. State*, 16 Tex. App. 331.

As to the cases cited by counsel for defendants on this question of a single sale or two or three sales constituting a "business" or being acts from which the court will infer that the person making the sales was engaged in the "business," the court is of the opinion that they can be distinguished from the case at bar.

In *DeMonte v. Pabst*, 14 Dec. 97, there were two sales made in different months, and it was further shown that the person making the sales had taken out and held at the times of the sales a government license, or United States special tax, and by the provisions of Sec. 4364-15 Rev. Stat., this fact may be offered in proof that the person taking out this license or paying this United States special tax is engaged in the "business" and shall be *prima facie* evidence of the fact that such person is actually engaged in the "business," etc., within the meaning of Sec. 4364-9 to 4364-23 Rev. Stat. *Volk v. Westerville*, 17 Dec. 776 (3 N. S. 241), was a criminal case where the accused was charged with unlawfully keeping a place where intoxicating liquors were sold at retail. It is impossible from the decision to determine under what section of the statutes the accused was convicted. If it were under Sec. 6942 then this decision is not in harmony or accord with the Ohio authorities. See *McGuire v. State*, 42 Ohio St. 530; *Oshe v. State*, 37 Ohio St. 494; *Johnston v. State*, 23 Ohio St. 556.

If the conviction was under some one of the numerous statutes prohibiting sales on certain days, at certain places, or to certain per-

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sons, then no doubt a single sale would be sufficient to convict, but this would not prove that the person making the sale was engaged in the business of trafficking in intoxicating liquors.

In the case of *Leonard v. Bowland*, 17 Dec. 558 (4 N. S. 577), the court does not hold that one or two or more sales constitute a case of engaging in the "business," but on pages 580 and 581 that this sale must be taken in connection with the fact that the plaintiff by her own admission was, up to a short time before these sales, engaged in the business and that she was buying from a nearby saloon over the back fence at fifteen cents a bottle and selling at a profit of eighty-five cents a bottle, and these facts together with the fact that she was charged on the duplicate with being engaged in the business made out a *prima facie* case which she had failed to overcome. This court is not disposed to go beyond the holding in this last case cited and is inclined to say with all due respect to the distinguished jurist who delivered the opinion, that the presumption in favor of the state in that case was stretched to its furthest limits.

I do not deem it necessary to decide whether or not the person who procured the beer for the state's agents at the house of plaintiff was acting as agent for the purchasers of the beer or of the owner of the house. Certain it is that there might have been inmates of that house who were not servants or employes of plaintiff and who could have acted as agents of the purchasers in procuring beer from some outside source of supply. It seems to the court that the evidence should fairly satisfy the mind of an ordinary man that such business was then carried on in that house, before holding that the burden of this tax should be assumed and paid by this woman. I am not satisfied that such was the case and therefore an injunction will be granted as prayed for in the petition.

MARGARET HALL v. CHARLES E. ROTH.

Moses Ruskin, for plaintiff.

J. L. Kohl, for E. Kleeman & Co..

Alfred Bettman, for defendant:

Luby, In re, 155 Fed. Rep. 659; *United States v. Howell*, 20 Fed. Rep. 718; *United States v. Dodge*, 1 Deady 186 [25 Fed. Cas. 879]; *Ledbetter v. United States*, 170 U. S. 606 [18 Sup. Ct. Rep. 774; 42 L. Ed. 1162]; *United States v. Rennecke*, 28 Fed. Rep. 847; *Commonwealth v. Coolidge*, 138 Mass. 193; *State v. Hynes*, 66 Me. 114; *Ward v. Barrows*, 2 Ohio St. 241; *Coombs v. Lane*, 4 Ohio St. 112; *Reynolds v. Schweinefus*, 27 Ohio St. 311; *Murphy v. Sims*, 13 Dec. 62; *Pugh*

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Prtg. Co. v. Yeatman, 12 Circ. Dec. 477 (22 R. 584); *Stevenson v. Hunter*, 5 Dec. 27 (2 N. P. 300); *Leonard v. Bowland*, 17 Dec. 558 (4 N. S. 577); *Cooley*, Taxation 51, 447; *Ohio v. Shanks*, Tapp. 45; *Springfield v. Ford*, 40 Mo. App. 586; *State v. Bugbee*, 22 Vt. 32; *State v. Chandler*, 15 Vt. 425; *Jordan v. State*, 22 Fla. 528; *Dansey v. State*, 23 Fla. 316 [2 So. Rep. 692]; *Voss v. Hagerty*, 11 Dec. Re. 408 (26 Bull. 268); *De Monte v. Pabst*, 14 Dec. 97; *Wymond Cooperage Co. v. Thompson*, 11 Dec. 486 (8 N. P. 347); *Simpson v. Serviss*, 2 Circ. Dec. 433 (4 R. 84); *Adler v. Whitbeck*, 44 Ohio St. 539 [9 N. E. Rep. 672]; *Anderson v. Brewster*, 44 Ohio St. 576 [9 N. E. Rep. 683]; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Sears v. Cottrell*, 5 Mich. 251; *Hodge v. Muscatine Co.* 196 U. S. 276 [25 Sup. Ct. Rep. 237; 49 L. Ed. 477]; *Newton v. McKay*, 130 Iowa 596 [102 N. W. Rep. 827]; *Cullinan v. Furthman*, 187 N. Y. 160 [79 N. E. Rep. 989].

GORMAN, J.

The evidence in this case shows that plaintiff occupied a four-room flat in the building known as No. 519 Smith St., Cincinnati, between January 1, 1908, and April 8, 1908; that on or about January 10, 1908, two inspectors from the Dairy and Food Commissioner's office visited Margaret Hall about 9 o'clock at night and were admitted to her apartments. They testified that there was present with plaintiff in her flat another woman; that Margaret Hall, when the inspectors came into the kitchen of the four-room flat, was ironing and that she asked the inspectors to buy some beer and they thereupon consented and she, the plaintiff, took two quart bottles of beer from an ice box in the kitchen and charged them fifty cents each for a quart bottle of beer which they drank with the women and went away. There is a conflict of testimony about the relative location of the rooms, the exits and the entrances thereto and as to the furniture therein. Margaret Hall denied that she ever saw the men or sold them any beer, denied that there was any woman staying with her in the flat but said she lived there with a gentleman friend and that he paid the rent for the flat. It was a place not adapted to the sale of intoxicating liquors but on the contrary according to the testimony of all persons was fitted up, adapted for, and apparently intended to be used as a place of residence of two or three or four persons. The furniture and household goods contained in the flat were covered by a chattel mortgage to Edward Kleeman & Co., executed long prior to the time when Margaret Hall is claimed to have commenced the business of trafficking in intoxicating liquors. On the trial the inspectors failed to identify Margaret Hall as the person whom they saw in the kitchen of the flat and from whom they claimed to have purchased the beer. The entry on the duplicate against Margaret Hall was made from in-

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formation furnished by these two inspectors to the auditor of state and by him transmitted to the auditor of Hamilton county. This case has been very ably presented on briefs and argued orally by Mr. Bettman for the defendants and by Mr. Kohl for E. Kleeman & Co. and I have read their briefs with great interest and examined the authorities cited with a view of arriving at a correct conclusion as to the facts as well as the law of the case.

It is urged very strenuously by counsel for defendants that these two sales, assuming for the purpose of the case that the testimony of the inspectors is to be given greater credence and weight than that of Margaret Hall, taken in connection with the surroundings and the attending circumstances, raises a presumption that these were not the only sales so made but that from the fact of a larger price being charged for the beer and the readiness displayed by the person offering to sell, that it was the customary and usual thing to do in that effect.

On the other hand, if this flat be considered, as the inspectors treated it, a house of ill-fame, because they went there without the female companions which they picked up when going to an assignation house—I say if this be considered a house of ill-fame from the fact that the sale or giving away of liquors is prohibited in such houses we would not expect ordinarily to find any liquors therein. Again it is urged that a failure to hold under the circumstances of this case that these sales claimed to have been made show that plaintiff was engaged in the business, will be fraught with dire results to the revenue department of the state. I do not think that the decision in this case will have any such serious effects upon the revenues of the state as counsel for defendants appear to apprehend. The traffic in intoxicating liquors cannot, to any great extent, be carried on secretly. There must be a resort to the places where they are sold by the public or a considerable number of persons before the business can be carried on profitably. In houses of ill-fame the traffic is entirely prohibited and if the police department and the state authorities do their duty under existing laws by endeavoring to punish for a violation of these laws forbidding the traffic or giving away of liquors in such places, instead of encouraging the keepers of such places to violate the law, and setting snares to catch these unfortunates in order to squeeze revenue out of them, the traffic will then be confined to the open and public places which advertise and hold out to the public the fact that they are engaged in the business and make no concealment thereof but on the contrary voluntarily go up to the county treasury and pay the tax and list their places.

The evidence in all these cases which have been before the court shows that there is apparently no effort made to learn of sales without

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the payment of the tax, except in houses of ill-fame and assignation houses; and the evidence further discloses that the state is allowing these inspectors, who are married men, their expenses of paying for rooms in assignation houses and expenses in houses of ill-fame and for buying beer and picking up street walkers to go with them to such resorts, all in the name of the great state of Ohio to raise revenue, whereas the state and every department thereof should be using every effort to suppress the traffic in such houses and enforcing the law prohibiting such sales of liquor. This court is appealed to, as a court of equity to find in favor of such practices; and it must and no doubt does appeal to the humorous side of the state agent's character when the courts readily fall into line with their efforts to raise revenue from these sources.

I am of the opinion that the evidence in this case does not disclose that plaintiff was engaged in the business of trafficking in intoxicating liquors at the time it is claimed by defendants she was so engaged. But I would recommend to counsel for defendants that as prosecuting attorney of this county, it might be well to inquire into any violations of Secs. 4364-1 to 4364-8 Rev. Stat. and Sec. 6943-5 Rev. Stat. and see that the police authorities and other executive officers of the city of Cincinnati and Hamilton county endeavor to carry out the will of the legislature by enforcing those sections referred to and then perhaps there will not be the occasion for the employment of so many inspectors and the expenditure of the state's money in a shameful endeavor to snare wretched women conducting resorts prohibited by law. The cases cited in the opinion handed down today of Carrie King against Chas. E. Roth, Treasurer, may be applied to the facts in this case. Counsel for E. Kleeman & Co. in his very able brief has also cited several authorities in support to the proposition that one sale, or two or a few sales do not constitute a "business."

The court is further of the opinion that even if these sales were sufficient to raise the presumption that the plaintiff was engaged in the "business," the household goods such as beds, chairs, carpets and such other chattels as were in the flat and covered by the chattel mortgage cannot be considered as being goods and chattels used in the conduct of the business of trafficking in intoxicating liquors, such as counters, side boards, liquors, etc., and therefore the lien of E. Kleeman & Co. is superior to that of the state by virtue of its lien under Sec. 4364-12 Rev. Stat.

An injunction will be granted as prayed for in the petition and answer and cross petition of E. Kleeman & Co.

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EXTRADITION.

[Franklin Common Pleas, March 2, 1909.]

F. H. MUTCHLER, IN RE.

ACCUSED MUST BE FUGITIVE FROM JUSTICE TO EFFECT HIS EXTRADITION.

Legal evidence sufficient to establish a *prima facie* case that the accused is a fugitive from justice, as well as that he is charged with crime in the demanding state, should be presented to the governor to whom the requisition is addressed. Evidence consisting merely of the paper containing the demand of the governor making the requisition, a certificate of the commonwealth's attorney of the county where it is charged the crime was committed attached thereto, but which contains no statement that the accused is a fugitive from justice, and a duly authenticated copy of the indictment against him together with his presence in this state is insufficient to establish a *prima facie* case that he is a fugitive from justice.

[Syllabus by the court.]

T. H. Clark, for commonwealth of Virginia.

T. J. Keating and G. L. Fuller, for the prisoner.

BIGGER, J.

The case is before the court pursuant to the provisions of Sec. 97 Rev. Stat., F. H. Mutchler having been arrested by virtue of a warrant issued by the governor of Ohio, addressed to the sheriff of this county, commanding him to arrest the said F. H. Mutchler and to bring him before any judge of the Supreme Court, circuit court, or common pleas court of this state, in whose district or jurisdiction the said Mutchler may be found.

The evidence submitted to the court upon the hearing, it is agreed by the parties, is the same evidence which was presented to the governor and upon which the warrant was issued. It is admitted that F. H. Mutchler, named in the requisition papers, is the person in the custody of the sheriff.

The evidence consists of the paper containing the demand of the governor of Virginia, and a certificate of the commonwealth's attorney of Henry county, Virginia, attached thereto, as well as a copy of an indictment against the said F. H. Mutchler returned by the grand jury of said Henry county, Virginia, and which the governor certifies to be authentic and duly authenticated in accordance with the laws of Virginia.

It is claimed that the requisition papers do not comply with the provisions of our statute, Sec. 95 Rev. Stat. In so far as this statute is in furtherance of the provisions of the United States constitution and laws, it is valid, but clearly both upon reason and authority in so far as it imposes any restrictions or additional requirements than those

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found in the United States constitution and laws, it is of no force and effect, and without stopping to discuss this question further, I am of opinion that the proceedings are not defective because certain of the requirements of Sec. 95 were not complied with, because they do attempt to impose restrictions upon the exercise of this power by the executive of the state, which are not found in the federal constitution and laws.

But there is another question which is more serious, and it is this: There was no evidence whatever before the governor and there is none before this court, the evidence here being the same as was submitted to the governor, to show that the said F. H. Mutchler is a fugitive from justice. The language of the federal constitution is (Art. 4, Sec. 2, Subdiv. 2),

"A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Before a person whose extradition is demanded should be delivered up, two things are essential: First, that he be charged with a crime in the demanding state, and second, that he be a fugitive from justice. It is just as necessary that one of these facts be shown as the other. Upon this subject, Spear, Extradition 378, says:

"The words here placed in italics relate to the flight from justice. They are words of description, and as such, state a fact which forms an essential part of the case, and which must be in every case of extradition authorized by the constitution. It is not enough that the party is, in a proper judicial proceeding, charged with treason, felony, or other crime, since this of itself does not make the case specified. Nor is it enough that he is thus charged in one state and found in another state, since this does not present the case stated in the constitution * * *. The flight from justice and the being found in another state than that in which the crime is charged to have been committed, present a distinct fact in the case, not identical with the charge and not necessarily involved in it or proved by it. And yet this fact exists in the case stated in the constitution, and must hence be shown to exist when the provision is practically applied for the purpose of extradition."

Again the same author says, page 387, "both the constitution and the law of congress by making the flight of the accused person a material part of the case, necessarily assumed that some evidence of this fact will and must be presented in the first instance to the demanding governor, and if he deems it sufficient, then by him to the governor to whom he addresses his requisition. This evidence in respect to both governors, must be legal evidence; not mere hearsay or suspicion or mere rumor, and must hence be under oath and must at least be suf-

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ficient to create a *prima facie* case of flight. Without such evidence, it cannot be known to either governor that such a fact exists at all, and until this is reasonably known, there is no occasion for any action on the part of either."

The same author quotes Judge Cooley, Const. Lim. to this effect: "The governor ought to have some showing under oath that the person demanded is in truth a fugitive from the state whose requisition is before him. This showing is as essential as is the evidence of the charge of crime, and is demanded no more by the fair import of the constitution than by justice. Without it, as was shown in the case of the Mormon prophet, a man has no security against being sent to distant states to answer charges from which he could never have fled, because he was never there.

In the case, *Jackson, In re*, 2 Flip. 183 [12 Am. Law. Rev. 602, 13 Fed. Cas. 197], cited by Spear at page 388, Judge Withy of the United States district court for the western district of Michigan, in discharging a prisoner for the want of any proof that he was a fugitive from justice, uses this language (page 186):

"It is as essential to the right of arrest and extradition to prove to the satisfaction of the governor of Michigan that the person charged with crime has fled from justice, as to prove that he is charged with a crime in such other state.

Again on page 187:

"The evidence that the person has fled from justice must not only be satisfactory to the governor, but must be legally sufficient, before the executive authority can be exercised. He cannot act upon rumor nor upon the mere representation of the person, nor upon the demanding governor's certificate. It should be sworn evidence, such as will authorize a warrant of arrest in any other case."

Without stopping to cite further decisions of courts other than our own state upon this point, my examination of the question satisfies me that the decisions of the courts both federal and state, are almost unanimous as to the necessity of proof that the person demanded is a fugitive from justice, which, of course, involves the fact of his presence in the demanding state and his flight therefrom. It is not necessary now to consider what constitutes flight, as that question is not now involved.

I come, therefore, to a discussion of the cases in our own state, and especially of the decision of the Supreme Court of this state in the case *Sheldon, Ex parte*, 34 Ohio St. 319. The fourth paragraph of the syllabus is:

"After an alleged fugitive from justice has been arrested on an extradition warrant, he will not be discharged on the ground that there was no evidence before the executive issuing the warrant, showing that the fugitive had fled from the demanding state to avoid prosecution."

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If this be taken apart from the facts of the case, it would seem to support the contention of counsel representing the commonwealth of Virginia. But the syllabus of a case must be read in the light of the facts of the case. *Witte v. Lockwood*, 39 Ohio St. 141, 145; *Sherard v. Lindsey*, 7 Circ. Dec. 245 (13 R. 315-321).

In the case *Sheldon*, *Ex parte*, *supra*, there was an affidavit of the prosecuting attorney of Jackson county, Missouri, attached to the requisition, in which he made oath that said Sheldon is a fugitive from justice from the said state of Missouri. Gillmore, Judge, said, page 327:

"While this does not in terms state that Sheldon had fled to avoid prosecution, it does state as a conclusion that he is a fugitive from justice; and it was for the executive to put a construction upon this language before issuing the extradition warrant, and under these circumstances the fugitive will not be discharged on the ground that there was no evidence before the executive issuing the warrant, showing that the fugitive had fled from the demanding state to avoid prosecution."

This decision, therefore, read in the light of the facts of that case, only decides that where there is sworn evidence before the governor, that the person demanded is a fugitive from justice, while it involves the conclusion of the affiant, a fugitive from justice being one who flees to avoid prosecution, yet it will be held sufficient, and the person demanded will not be discharged on the ground that there was no evidence before the governor to show that he had fled from the demanding state to avoid prosecution.

But suppose we give to it the broadest latitude, and hold that this decision means that when the case comes before a judge for hearing upon the charge that in no case will the prisoner be discharged merely because there was no evidence whatever before the governor that the person demanded was a fugitive from the demanding state, what rule is to govern this court in its decision if there be no evidence offered upon the hearing before the court that the person demanded is a fugitive from justice? Will the court be concluded by the fact that the governor has issued his warrant? That such is not the rule in Ohio is apparent from the decision of the Supreme Court in *Wilcox v. Nolze*, 34 Ohio St. 520.

In that case the court decided, first, that the power of the judge to discharge an alleged fugitive from justice under the act of 1875 is essentially the same as under the habeas corpus act.

Second, the provisions of the constitution of the United States, Art. 4, Sec. 2, and the act of congress, United States Revised Statutes, Sec. 5278, which provide for the extradition of those who shall flee from justice and be found in another state, are confined to persons who are actually and not merely constructively present in the demanding state

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when they commit the acts charged against them. And in a proceeding on habeas corpus for discharge from arrest on a warrant of extradition issued by the governor in compliance with the requisition of the governor of another state, parol evidence is admissible to show that there had been no such actual presence of the accused in the demanding state.

In *Wilcox v. Nolze*, *supra*, as well as in *Sheldon*, *Ex parte*, *supra*, the governor had issued his warrant, and the person demanded had been arrested by virtue of the warrant. And yet the Supreme Court held the court would hear oral evidence upon the question as to the person demanded being a fugitive from justice of the demanding state, notwithstanding the governor had issued his warrant. I am of opinion that the Supreme Court did not mean to announce the broad rule that it was immaterial whether there was any proof before a governor that the person demanded was a fugitive from justice, but if it did, it clearly did not mean that when the case was heard before the court, it was still immaterial whether there was any showing to the court that he was a fugitive from justice. Now, in this case, there is no evidence whatever that any person has made oath anywhere that the said F. H. Mutchler is a fugitive from justice. If this be an essential fact to the right of extradition, when is the prisoner to have a chance to be heard upon that question, if not now? The courts of Virginia will not inquire whether he was rightfully or wrongfully extradited. It is a well settled principle that when a person is properly charged with crime, the courts will not inquire into the circumstances under which he was brought into the state and within the jurisdiction of the court. 12 Am. & Eng. Enc. Law 607.

A detention which was originally illegal may afterwards become legal, and thus bar the prisoner's right to discharge, and this principle has been applied to the case of one who is kidnapped or unlawfully taken in one state and delivered to the authorities of another. 15 Am. & Eng. Enc. Law 158.

It is evident, therefore, that unless the person sought to be extradited is entitled to demand that at least a *prima facie* case shall be made out against him, either before the governor or the judge, before he shall be turned over to the agent of a foreign state, that he may be extradited without any proof whatever that he is a fugitive from justice, which is one of the two essential facts to be shown under the constitution of the United States to warrant the extradition of a citizen of one state to another state. I do not believe that a fair construction of the decisions of the Supreme Court of this state requires us to hold that a citizen may be arrested and extradited without even a *prima facie* case being made as to one of the two essential facts to the right of extradition. In my opinion, the person demanded is not called

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upon to make any defense, until at least a *prima facie* case is made out against him.

The statute of this state, Sec. 97, requires the judge to hear and examine such charge, and upon proof made in such examination by him adjudged sufficient, shall commit such person to the jail of the county, etc. It will hardly be claimed that the person demanded shall make the proof against himself which is to satisfy the court that he ought to be committed to the jail of the county. But the proof must come from the other side. To hold that the person demanded shall assume the burden of proof that he is not a fugitive from justice, is to require him to assume the burden of proving a negative. In this case the averment is that he committed the crime in the year 1908 in the state of Virginia. The difficulty and practical impossibility of his being able to prove that he was not at any time in Virginia during the year 1908, illustrates the great difficulty and practical impossibility of such proof at the hands of the person demanded. If it is essential for the authorities demanding the extradition to offer some proof of the first fact, to wit, that he is charged with crime in the state of Virginia, it is equally essential that some proof be offered that he is a fugitive from justice, and for the want of any evidence either before the governor or before this court upon that point, the court holds that there is a complete failure of proof upon one of the two facts essential to be shown to warrant the commitment of the said F. H. Mutchler to the jail of the county to be delivered to the agent of the state of Virginia, and for that reason he is discharged.

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NEGLIGENCE—RELEASE.

[Summit Common Pleas, April Term, 1907.]

*HARVEY CONRAD v. KELLER BRICK CO.

1. PROXIMATE CAUSE OF INJURY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Notwithstanding plaintiff was careless in not immediately moving to a place of safety after removing an obstruction from a clay granulating machine operating several revolving knives, the negligence of defendant's foreman, having charge of the levers and being in a position to observe plaintiff's danger, starting the machine, without other warning than "Look out!" before plaintiff had gotten away from his place of danger, constitutes the proximate cause of the injury.

2. TENDER BACK OF MONEY PAID FOR RELEASE FROM LIABILITY FOR INJURIES NECESSARY TO SUIT FOR DAMAGES.

Tender back of money received in release of liability for personal injuries sustained is prerequisite to repudiation of the release, and notwithstanding the release be obtained by grossest fraud, the parties must be put in *statu quo* before an action for damages for the injuries complained of can be brought.

[Syllabus approved by the court.]

MOTION for judgment on the pleadings.

Plaintiff alleges the incorporation of defendant under the laws of Ohio, its being engaged in the manufacture of brick at Cuyahoga Falls, Summit county, Ohio, and his employment by it as a common laborer for several years prior to and on August 9, 1905, the date of his injury.

"Plaintiff further says, that among the machines and appliances in use in said plant, on said ninth day of August, 1905, and for a long time prior thereto were the following: a plug mill consisting of a metallic trough about two feet in width, two and one-half feet high, and eight feet long, open at one end within which a shaft extended the entire length thereof, having knives attached to said shaft in such manner that when said shaft was made to revolve by applying power to a large cog wheel fastened to said shaft just outside the closed end of said trough the clay deposited in said trough was ground up and forced toward and out of the open end of said trough and fell between two horizontal and parallel metallic rolls, which, when in operation, revolved together in such a manner as to still further crush and pulverize said clay. There was also an endless belt about eighteen inches wide and thirty feet long which passed over pulleys, one of which was situated just above the east edge of the trough of said plug mill near

*Affirmed by the Summit circuit court, without report, October 12, 1907; both affirmed by the Supreme Court, without report, January 19, 1909, *Conrad v. Brick Co.* 79 Ohio St. 461.

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the closed end thereof, in such manner that when said belt was in operation clay could be, and was, conveyed upon the surface thereof, to and deposited in, said plug mill.

“Plaintiff further says, that said plug mill and said rolls were so constructed as to act independently of each other, and were controlled in their action by means of two separate and distinct levers situated near the open end of said plug mill; that said belt could be operated only when said plug mill was in motion, but that said plug mill could be operated without operating said belt, and that the action of said belt was controlled by means of a third lever situated in close proximity of the levers which controlled the action of the plug mill and rolls as aforesaid.

“Plaintiff says, that for a long time prior to said ninth day of August, 1905, he had ordinarily been employed during the forenoon of each day, in picking stones out of said plug mill and said rolls, which had been deposited therein along with the clay aforesaid, in order to prevent injury to said machines, and that he was so employed on the morning of said ninth day of August, 1905; and plaintiff says that in the doing of said work, or of any work pertaining to the operation of the machines and appliances aforesaid, he was under the control and direction of one William Keller, who had charge and general management of that portion of said plant in which said machines were located.

“Plaintiff further says, that at about 11 o'clock A. M. on said ninth day of August, 1905, the said machines and appliances not then being in operation, said William Keller directed plaintiff to assist him in placing a new knife upon the shaft of said plug mill in place of one which had been damaged; that plaintiff thereupon did assist said Keller in placing said knife upon said shaft, and that as soon as the same had been placed thereon, said Keller stepped to the lever which controlled said plug mill, as aforesaid, and started said mill in motion, while plaintiff remained in the position which he was then occupying, namely, with his right foot upon the west rim of the trough of said plug mill and his left knee upon the upper surface of said belt at the point where it passed over the pulley located just above the east rim of the trough of said plug mill, as aforesaid, in order that he might watch the operation of said mill; and plaintiff says that said Keller knew that plaintiff was occupying the position aforesaid at the time said Keller started said plug mill in motion, and further says that plaintiff was in plain view of said Keller during all the time which elapsed from that time until plaintiff was injured as hereinafter set forth.

“Plaintiff further says, that soon after said plug mill had been started in motion, as aforesaid, he discovered a stone in the bottom of said trough near the upper or closed end thereof, and at once

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gave to said Keller the usual signal, by holding up his hand, to stop the operation of said plug mill; that said Keller thereupon did stop said mill; and that plaintiff as soon as said mill was stopped, bent over and with his right hand reached down into said plug mill between the knife aforesaid and secured said stone, and had scarcely straightened up and tossed said stone to one side when said Keller called "Look out," and at the same instant started both said plug mill and said belt in motion by pulling the levers which controlled the same; said plaintiff's left leg was by the sudden starting of said belt, thrown into said plug mill and was crushed and mangled by the knives thereof to such an extent that it was necessary to amputate the same, and plaintiff was at once taken to the Akron City Hospital where said left leg was shortly afterward cut off at a point a few inches below the knee.

"Plaintiff further says, that said Keller negligently and carelessly started said belt and plug mill in motion without being notified by the plaintiff that plaintiff was ready to have said Keller start the same, and without giving the plaintiff any sufficient notice that he was about to start the same, and without giving to plaintiff any notice whatever that he was about to start said belt in motion, or any opportunity to get off said belt before the same was started, and at a time when he, and said Keller, knew, or by the exercise of ordinary care would have known, that plaintiff was in a position such that serious injury would be likely to result to plaintiff from the starting of said belt and plug mill, as aforesaid.

"Plaintiff further says, that the injuries sustained by him, by being caught and mangled in said plug mill, as aforesaid, were caused wholly by the negligence of the defendant and its agent, the said William Keller, as above set forth.

"Plaintiff further says, that as a result of the injuries received by him, as aforesaid, he has lost his foot and the lower portion of his left leg from a point a few inches below the knee; that at the point where said leg was amputated, the same is yet sore and unhealed; that by reason of said injuries his general health has been seriously and permanently impaired; that by reason of said injuries he has been made to endure severe and continuous physical and mental pain, and will be compelled to endure such pain for an indefinite period of time in the future; that because of said injuries he has required and yet required constant care, nursing and attention, and will continue to require such care for a considerable period of time in the future; that at the time of receiving said injuries he was fifty-five years of age and was in good health, and was, and for a long time prior thereto had been, steadily employed and earning wages of \$1.70 per day; and that since receiving said injuries, and by reason thereof he has been unable to perform any

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work whatever, and has thereby already suffered a loss in wages amounting to \$130; that by reason of said injuries he will be unable hereafter to perform his usual, or any other ordinary labor; and that in all the premises he has sustained damages in the sum of \$20,000, for which he prays judgment against defendant."

Defendant answering the above petition after admitting its incorporation and business and its employment of plaintiff as stated, says:

"It further admits that on said August 9, 1905, and for a long time prior thereto, it has had among the machines and appliances in its said brick plant, a machine known as a granulator, but incorrectly called in plaintiff's petition a "pug mill," and that the description contained in plaintiff's petition of said granulator or machine is substantially correct; that connected with said granulator and used therewith was an endless belt of about the width and length as set forth in plaintiff's petition, and that the same was used for the purpose of conveying clay or earth to said granulator.

"This defendant further admits that on said August 9, 1905, and for a long time prior thereto, plaintiff had ordinarily been employed during the morning of each day in picking stones off of said granulator and the rolls connected therewith, and which stones had been deposited therein along with the clay aforesaid, in order to prevent injury to said machines.

"This defendant admits that plaintiff, at the date set forth in his petition, stood with his right foot upon the west rim of the trough of said granulator with his left knee upon the upper surface of said belt, at or near the point where it passed over the pulley located just above the east rim of the trough of said granulator, as described in plaintiff's petition. This defendant admits that plaintiff's left leg was caught in said granulator and the same was injured, necessitating amputation thereof a few inches below the knee, and that by reason thereof plaintiff suffered physical and mental pain, and that by reason of said injury, plaintiff required care, nursing and attention, and that at said time plaintiff was fifty-five years of age, in fairly good health and was earning the ordinary wages for men of his capacity, to wit, about the sum of \$1.70 per day.

"For a second defense to plaintiff's petition, defendant here refers to, and makes a part thereof, all the allegations, averments and denials of its first defense, as fully as if again and at length herein rewritten, and, further answering and for a second defense, says that if this defendant is chargeable with the negligent acts complained of in plaintiff's petition,—a fact which this defendant wholly denies, nevertheless the said plaintiff ought not to maintain his action for that, after the injury received by the plaintiff, he permitted and requested the de-

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fendant to pay the expenses incurred by plaintiff in and about the attention, care and nursing, including medical and surgical services incident to said injuries, and amounting to, in the aggregate, over \$184 and that thereafter, to wit, on or about September 8, 1905, the plaintiff also received and accepted from this defendant, as a full and complete settlement and release for all claims for damages and expenses against this defendant and arising from such injury, the further sum of \$275 with full knowledge upon the part of plaintiff that he was not bound to accept the same, but that in so doing he released this defendant from all claims for damages against it arising from the injuries set forth in his petition, and thereupon and in consideration of the payment by this defendant of said sums and on or about the said September 8, 1905, he executed and delivered to this defendant his certain receipt and release in that behalf, in writing, as follows, to wit:

“ ‘In consideration of the sum of two hundred and seventy-five dollars (\$275) to me in hand paid by the Keller Brick Company of Cuyahoga Falls, Ohio, I do hereby release and forever discharge said The Keller Brick Company from any and all actions, claims and demands for, upon or by reason of any damages, loss or injury which heretofore have been or which hereafter may be sustained by me in consequence of any injury which I receive at the plant of the Keller Brick Company, Cuyahoga Falls, Ohio, on or about the ninth day of August, 1905. It is further agreed and understood, that the payment of said sum of two hundred and seventy-five dollars (\$275) is not to be construed as an admission on the part of said The Keller Brick Company of any liability whatever in consequence of said accident or the injury to me.

“ ‘In witness whereof I have hereunto set my hand and seal this eighth day of September, A. D., 1905.

(Signed) Harvey Conrad.

Signed, sealed and delivered in the presence of

Leon B. Bacon, (Signed)

Cleveland, Ohio.

Arthur Sharp, (Signed)

Akron, Ohio.

“ ‘State of Ohio, Summit county, ss.

“ ‘Harvey Conrad being first duly sworn according to law, deposes and says that he has read the foregoing instrument and is familiar with its contents; that he did sign the same and does hereby acknowledge the same to be his free and voluntary act and deed.

(Signed) Harvey Conrad.

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“Sworn to before me by the said Harvey Conrad and by him subscribed in my presence this eighth day of September, A. D. 1905.

(Signed) Arthur Sharp,
Notary Public.’

“And this defendant avers, that by reason of the facts and things set forth in this, its second defense, plaintiff released this defendant from all liability to him by reason of the injuries complained of in this petition, and the plaintiff is now, by reason of the matters and things set forth in this, its second defense, estopped from asserting any claim for the matters and things complained of in this petition against this defendant.

“For a third defense to plaintiff’s petition, this defendant says, that the injuries received by plaintiff were caused by his own carelessness, negligence and want of ordinary care; that this defendant gave plaintiff notice of its intention to start said machinery and belt and that plaintiff was negligent and careless in failing to remove his limbs and body from said belt after receiving such notice, and that he was guilty of gross carelessness and negligence in placing his right foot upon the side of said mill and in placing his left foot and knee upon said belt at the time and in the manner described in plaintiff’s petition, and that whatever injury plaintiff received as in his petition set forth, his own carelessness, negligence and want of ordinary care contributed thereto as herein set forth.”

Plaintiff in reply to such answer “denies each and every allegation, averment and statement in said amended answer contained, except those which are hereinafter admitted to be true or qualified.

“For a further reply to the ‘second defense’ of said amended answer, plaintiff denies that he permitted and requested the defendant to pay the expenses incurred by plaintiff in and about the attention, care and nursing, including medical and surgical services incident to said injuries, and says that if defendant has expended any sum of money whatever, in payment for nursing, care, attention or medical services furnished to plaintiff, incident to said injuries, as to which plaintiff has no knowledge, such expenses were contracted for and incurred by defendant, and not by plaintiff, and that plaintiff was never consulted by defendant in regard to the incurring of said expenses, or to the payment thereof.

“Plaintiff further denies that thereafter, to wit, on or about September 8, 1905, plaintiff also received and accepted from defendant as a full and complete settlement and release for all claims for damages and expenses against defendant and arising from such injury, the further sum of \$275, and denies that he ever received said sum, or any

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sum whatever, from defendant on account of said injuries, and further denies that by reason of the payment to him of said sum of \$275 he released defendant from all claims for damages against it arising from the injuries set forth in his petition.

“Plaintiff admits that on said eighth day of September, 1905, the sum of \$275 was paid to him, and that he signed what he understood to be a receipt for said payment. But plaintiff denies that said payment was made to him by the defendant, and denies that he ever knowingly signed any paper writing which released, or purported to release the defendant from liability on account of the injuries received by plaintiff as set forth in his petition. And plaintiff says that if he signed the receipt and release of which defendant’s amended answer purports to set forth a copy, he signed the same without understanding the true import and meaning thereof, and his signature thereto was obtained by deceit and fraud practiced on him, as hereinafter set forth.

“Plaintiff says, that on the eighth day of September, 1905, he was yet detained at the Akron City Hospital by reason of the injuries received by him as set forth in his petition, and was in a weakened physical condition as a result of said injuries; that his mental faculties have ever been dull and weak, and on said eighth day of September, 1905, were more than ordinarily dull and weak by reason of his weakened physical condition and of the suffering which he had been, and then was, compelled to endure; that about the middle of the forenoon on said eighth day of September, 1905, he was sitting propped with pillows, in a wheel chair in one of the rooms of said hospital, when word was brought to him by one of the hospital attendants, that some person desired to see him in an adjoining room; that he thereupon wheeled his chair into the adjoining room, and met there a gentleman whom he had never seen before, who introduced himself to plaintiff as a Mr. Bacon, and asked plaintiff if plaintiff’s name was Conrad, and if plaintiff was the person who was injured at the plant of the Keller Brick Company, to which questions plaintiff gave affirmative replies. Said Bacon then asked some further questions as to how the accident occurred, and as to how much wages plaintiff was getting at the time the accident occurred, and then appeared to do some figuring upon a paper, after which said Bacon stated to plaintiff that he represented an insurance company with which the Keller Brick Company had an arrangement or contract in force at the time of the accident whereby the employes of said brick company were insured to some extent against accidents, and that by reason of such arrangement, plaintiff was entitled to receive from the insurance company which he, the said Bacon, represented, insurance benefits amounting to the sum of \$275, and further said that he would be ready to pay over to plaintiff that amount of money in payment of

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such benefits, as soon as he could prepare the proper receipt for such payment, if plaintiff were willing to receive said amount in full payment of the insurance benefits so due to him, and to sign a receipt therefor, which plaintiff then expressed his willingness to do.

"Plaintiff further says, that said Bacon thereupon left the hospital saying that he would prepare a receipt and return in a short time, and would then pay over the money; that said Bacon did return about an hour later, bringing with him a gentleman who was also a stranger to plaintiff and at once handed to plaintiff said sum of \$275, and a paper which, as plaintiff remembers, appeared to be typewritten, and which said Bacon said was the receipt of which he had spoken, and which said Bacon thereupon requested plaintiff to sign, at the same time indicating to plaintiff the places in which he wished plaintiff to sign the same, and plaintiff says that he did thereupon sign said paper in the places so indicated to him.

"Plaintiff further says, that after signing his name to said paper as aforesaid, the gentleman who came with Mr. Bacon asked plaintiff as to whether or not plaintiff acknowledged his signing of said paper to be his free act and deed, but says that no question as to whether or not he had read said paper was either asked of, or read to him, and that he did not make any statement to said gentlemen, or either of them, to the effect that he had read said paper; that he did not read said paper, and could not read the same as he has never learned to read even the simplest words without assistance; and that he signed said paper relying upon the statements made to him by Mr. Bacon as above set forth, believing that said paper was simply a receipt for the payment to him by an insurance company of insurance benefits to which he was entitled.

"Plaintiff further says, that at and prior to the time of the payment to him of said sum of \$275, he was not informed by anything said or read to him, or in any manner whatever, that the Keller Brick Company was making such payment, or that said payment was intended to have any effect whatever in the way of releasing said brick company from liability for the injuries which plaintiff had received, or that the paper which plaintiff signed as aforesaid purported to release said brick company from any liability for such injuries, and further says that if he had been informed that said payment was being made for the purpose of making settlement of plaintiff's claim against said brick company, on account of said injuries, or that the paper which plaintiff signed as aforesaid purported, or was intended, to release said brick company from any liability to plaintiff, plaintiff would have refused to accept said money, and would have refused to sign said paper; that his acceptance of said money was induced and his signature to said

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paper was procured by the deceit and fraud practiced upon him, as aforesaid.

Plaintiff therefore denies that the receipt by him of said sum of money and the signing by him of said alleged release under the circumstances above described, in any way operated to release defendant from its liability to plaintiff or to estop plaintiff from ascertaining his claim for the matters and things complained of in his petition against defendant.

The jury duly impaneled and sworn, the defendant moved the court for a judgment on the pleadings.

R. M. Smith and J. A. H. Myers, for plaintiff.

Musser, Kimber & Huffman and L. B. Bacon, for defendant.

DOYLE, J. (Orally.)

The solving of this matter is not unattended with difficulties, by any means, and this is a pretty short time to give to settling such important matters as these. An inferior court has too much to do to consider the matter long and delay other parties who are on hand to have their matters adjudicated.

I have taken up the matter first on the two questions as to whether there is a cause of action stated in the petition, and whether there are allegations in the petition showing that there was contributory negligence on the part of the plaintiff.

I am satisfied that there are facts set up in the petition sufficient to constitute a cause of action. Of course there are allegations there showing what, to my mind, is negligence on the part of this plaintiff in a certain way. I regard it as careless for the plaintiff, after he got the stone out of this trough where the shaft with the knives placed on it revolved, to keep his knee on the belt. It would have been a wise precaution to have immediately got out of that position.

But the defendant's foreman had control of the levers which started that machinery. So far as the allegations of the petition are concerned, he knew this man was occupying that position, was in a position where he could see whether the plaintiff had got off or removed himself from that position, and with no other warning than a call and pulling of the lever, he started the machinery and brought on the accident. We must assume for the purposes of this motion that these allegations are true, because we are passing on the sufficiency of the petition, and not taking into consideration the facts that may be proven.

The facts set out in this petition, however, give us a situation of the case under which it seems to me that it was the duty of the defendant's foreman to have seen that the plaintiff was out of danger be-

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fore he pulled the lever. So that his negligence was the proximate cause of the injury.

If that were the only matter in this case, I should be disposed to let the case go to the jury.

Now I come to the question whether it was plaintiff's duty, before making the defense that he does to the affirmative matter set out in the second ground of defense of the defendant, to have tendered back the money that was paid him.

Now the reply is very skilfully drawn, there is no question about that. A master hand has drafted the reply, and I doubt whether the like of it can be found anywhere in the books. I don't believe any other reply could have been made to make more trouble for the defendant than that reply.

The defendant, in its second ground of defense, perhaps might have got along without setting out the writing, but still it isn't necessary to go into that. It has set out that there was a full settlement, for the sum of \$275, and says that thereupon, in consideration of the payment by this defendant of said sum, and on or about September 8, 1905, he executed and delivered to this defendant his certain receipt or release, in that behalf in writing as follows:

In consideration of the sum of \$275. to me in hand paid by the Keller Brick Company of Cuyahoga Falls, Ohio, I do hereby release and forever discharge said the Keller Brick Company from any and all actions, claims and demands for, upon or by reason of any damages, loss or injury which heretofore have been or which hereafter may be sustained by me in consequence of any injury which I received at the plant of the Keller Brick Company, Cuyahoga Falls, Ohio, on or about the ninth day of August, 1905.

Now that's the defense. The liability, if any, that the Keller Brick Company owed to the plaintiff they claim was settled and adjusted by that instrument, that settlement, and evidenced by that instrument.

The reply contains a general denial of each of the allegations in that answer, not admitted to be true or qualified. It is broad enough to cover the allegations there of the execution of that instrument.

Now as to the qualifications. He denies in this reply that he received and accepted from the defendant as a full and complete settlement and release for all claims for damages and expenses against defendant arising from said injury, for the further sum of \$275, and so forth. But he admits that on the eighth of September, 1905, the sum of \$275 was paid to him and that he signed what he understood to be a receipt for said payment. But the plaintiff denies that said payment was made to him by the defendant, or that he ever knowingly signed any paper writing that released or purported to release the company

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from liability for the injury received by plaintiff as set forth in his petition.

The plaintiff says that if he signed the receipt and release, and by the way, there is no denial of the signing of this paper, except that general denial by this reply—plaintiff says that if he signed the receipt and release of which defendant's amended answer purports to set forth a copy, he signed the same without understanding the true import and meaning thereof, and his signature thereto was obtained by deceit and fraud practiced upon him as hereinafter set forth.

He doesn't deny the probability or possibility of the thing existing, —but says that if there existed that thing, why that then some other thing is connected with it. Something necessarily follows from its existence.

He admits that there is a probability that he did, and there isn't any denial that he signed it, but if he did sign it then it was signed under the following circumstances, which he proceeds to relate.

Now then, what follows is a defense to this settlement evidenced by this written instrument set out in the defendant's answer. He says, that if such a document is in existence, this is his defense to it. I don't see that it makes a different situation than if he had come out openly and said that he did sign the instrument set forth in defendant's answer, but that he signed it by reason of the fraud perpetrated upon him and then proceeded to set up these things which constituted the fraud.

So that, it is different from the situation where he might have pleaded in his reply that this same indemnity company had paid him that money, and that they had paid it to him for a certain purpose, I don't care what that purpose might be, and had ignored the Keller Brick Company entirely, perhaps set out that these people had paid this money on account of some liability that they owed to him. He might have had accident insurance of his own and received that money from them. The indemnity company might have provided him indemnity upon premiums paid by the defendant in fact, and settled with him.

That isn't the situation made by this answer and this reply. There isn't any positive assertion of any money paid by a volunteer. The situation is, that if he signed the paper set forth in this answer of the defendant's, it was signed by reason of those representations. That takes us back to the answer, and the answer doesn't show anything except that a settlement was made with the defendant.

You have enough set forth in the reply to nullify that settlement if it was gotten by fraud.

Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294 [70 N. E. Rep. 74; 100 Am. St. Rep. 666] and *Gould v. Bank*, 86 N. Y. 75, 79, which

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are argued out at length, and with good reason, would compel you, before you can repudiate that agreement, even for the grossest kind of fraud, to put the parties in *statu quo*, so that I don't see any way out of it but to find that the defendant upon the pleadings as I have them here, would be entitled to judgment because of there having been a failure to put the defendant back in the position in which it was before it perpetrated this alleged fraud upon plaintiff.

I know that upon that reply a strong argument can be made, because it has been made, to support the position of the plaintiff.

If a reviewing court find his position correct, it is better that the reviewing court decide the matter before this court goes through a two or three days' trial. I will therefore sustain the motion of the defendant and render judgment on the pleadings in favor of the defendant.

LIBEL AND SLANDER.

[Hamilton Common Pleas, 1909.]

MAX LEVY V. WILLIAM LITTLEFORD.

1. ATTORNEY AT LAW HELD NOT PRIVILEGED TO SLANDER A THIRD PARTY UNLESS THE LIBELOUS STATEMENT IS PERTINENT TO THE CASE.

An attorney at law in his opening statement to the court and jury is not privileged to make statements, slanderous *per se*, against one not a party to the case unless such statement be pertinent or material to the case on trial.

2. AVERMENT OF MATTER AS SLANDEROUS PER SE.

An averment in an action for slander against an attorney at law accusing him of making false and malicious statements concerning one not a party to the case on trial, that such defamatory matter spoken was not pertinent to the issues on trial is sufficient as against demurrer under Sec. 5093 Rev. Stat.

3. TRUTH OF DEFAMATORY STATEMENTS AVAILABLE ONLY AS SUBSTANTIVE DEFENSE.

Under Sec. 5094 Rev. Stat. permitting defendant to prove the truth of defamatory statements or show mitigating circumstances therefor, the matter of privileged statements during the progress of a trial can be made available in the action for slander only as a substantive defense.

4. PUBLICATION OF TRANSCRIPT OF STENOGRAPHER CONTAINING SLANDER NOT ATTRIBUTABLE TO COUNSEL.

An attorney participating in a trial cannot be held liable for libel on account of publication through the transcript of the court stenographer for malicious and defamatory words spoken during the progress of the trial, unless it is averred that the court stenographer was under the control of the defendant and was ordered by him to write down what was said.

[Syllabus approved by the court.]

W. W. Symmes, for plaintiff:

Cited and commented upon the following authorities. *Nicholson v. Merritt*, 23 Ky. Law Rep. 2281 [67 S. W. Rep. 5]; *Newell, Sland. & Lib.* 270, 275; *State v. Norton*, 89 Me. 290 [36 Atl. Rep. 394]; *Lauder*

Levy v. Littleford.

v. *Jones*, 13 N. Dak. 525 [101 N. W. Rep. 907]; *Sweeney v. Baker*, 13 W. Va. 158 [31 Am. Rep. 757]; *Lewis v. Chapman*, 16 N. Y. 369; *Hamilton v. Eno*, 81 N. Y. 116; *Briggs v. Garrett*, 111 Pa. St. 404 [2 Atl. Rep. 513; 56 Am. Rep. 274]; *Hoar v. Wood*, 44 Mass. (3 Metc.) 193; *Hastings v. Lusk*, 22 Wend. (N. Y.) 410; *Garr v. Selden*, 4 N. Y. 91; *Marsh v. Ellsworth*, 50 N. Y. 309; *Hodgson v. Scarlett*, 1 Holt 621; *Brook v. Montague*, 3 Cro. Jac. 90; *Gilbert v. People*, 1 Denio (N. Y.) 41 [43 Am. Dec. 646]; *Bradley v. Heath*, 29 Mass. (12 Pick.) 163; *Remington v. Congdon*, 19 Mass. (2 Pick.) 310; *Maulsby v. Reifsnider*, 69 Md. 143 [14 Atl. Rep. 505]; *Kent v. Bongartz*, 15 R. I. 72 [22 Atl. Rep. 1023; 2 Am. St. Rep. 870]; *Forbes v. Johnson*, 50 Ky. (11 B. Mon.) 48; *Davis v. Mathews*, 2 Ohio 257; *Union Mut. L. Ins. Co. v. Thomas*, 28 C. C. A. 96 [83 Fed. Rep. 803]; *Munster v. Lamb*, 11 Q. B. 588.

H. G. Frost, for defendant:

Cited and commented upon the following authorities. *Munster v. Lamb*, 11 Q. B. 588; *Hoar v. Wood*, 44 Mass. (3 Metc.) 193; *Aylesworth v. St. John*, 25 Hun (N. Y.) 156; *Hollis v. Meux*, 69 Cal. 625 [11 Pac. Rep. 248; 58 Am. Rep. 574]; *Maulsby v. Reifsnider*, 69 Md. 143 [14 Atl. Rep. 505]; Cooley, Const. Lim. 631.

GORMAN, J.

There are four causes of action set out in the petition, two for slander and two for libel.

As to the first cause of action for slander, there appears to be no question but that the words alleged to have been uttered by the defendant of and concerning the plaintiff are slanderous *per se*, if false. The question raised by the demurrer to the petition is, whether or not they are privileged by reason of the fact that defendant was an attorney at law and uttered the words in his opening statement to the court and jury, on the trial of one Harry Kohn in the court of common pleas of Hamilton county, Ohio. Plaintiff avers in his first cause of action that the words were falsely and maliciously spoken and published, and that the words were in no manner pertinent to the issues in said cause on trial, which trial was one for arson, in which said Kohn was indicted and being tried for burning his property contrary to the statute in such case made and provided.

In England it is settled that with regard to judicial proceedings neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for words spoken or written in the ordinary course of any proceeding before any court or tribunal recognized by law, even though uttered falsely and maliciously, and although not pertinent to the issues. This immunity is said to be an absolute privilege. See Clark & Lindsell's Law of Torts, 575, 576, 577, 578, Chap. 17; *Rex v. Skinner*, Lofft 56; *Munster v. Lamb*, 11 Q. B. D. 588.

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But in America the courts have qualified this broad doctrine, and it is generally held with us that the parties, counsel and witnesses are not privileged in their statements made in the course of an action, unless the statements are pertinent and material to the case. See *Smith v. Howard*, 28 Iowa 51; *Hoar v. Wood*, 44 Mass. (3 Mete.) 193; *Rice v. Coolidge*, 121 Mass. 393 [23 Am. Rep. 279]; *White v. Carroll*, 42 N. Y. 161 [1 Am. Rep. 503]; *Hollis v. Meux*, 69 Cal. 625 [11 Pac. Rep. 248; 58 Am. Rep. 574]; *Maulsby v. Reifsnider*, 69 Md. 143 [14 Atl. Rep. 505].

And this is the doctrine laid down by our Supreme Court in the case of *Mauk v. Brundage*, 68 Ohio St. 89, 97 [67 N. E. Rep. 152]:

"The American rule, as held in *Smith v. Howard*, 28 Ia. 51; *Hoar v. Wood*, 3 Mete. 193, and *McLaughlin v. Cowley*, 127 Mass. 316, is that, in order to be privileged, the statement must be pertinent and material to the matter in hand. To be pertinent and material it must tend to prove or disprove the point to be established, and have substantial importance or influence in producing the proper result."

There is nothing in the averments of the first cause of action to show that the statement made by the defendant in his opening statement to the court and jury was pertinent or material to the issue in the case. On the contrary the plaintiff avers in the last sentence of his first cause of action, that the defamatory matter so spoken and published was in no manner pertinent to the issues in the said cause on trial.

For the purpose of the demurrer this averment must be considered as true.

Under our code, Sec. 5093 Rev. Stat., it shall be sufficient for the plaintiff in libel and slander to state generally that the defamatory matter was published or spoken of the plaintiff; if the allegation be denied, the plaintiff must prove the facts, etc.

Section 5094 Rev. Stat. provides that in actions of libel and slander the defendant may allege and prove the truth of the matter charged as defamatory, etc., and in any case the defendant may prove any mitigating circumstances to reduce the amount of damages. It is doubtful if, under our code, the matter of privileged statement can be made available except as a substantive defense; especially in a case where it is averred that the statement was not pertinent and material to the issues. This appears to be the holding in the case of *Steen v. Friend*, 11 Circ. Dec. 235 (20 R. 459), the fifth paragraph of the syllabus being as follows:

"To make the defense that a paper writing, libelous upon its face, is privileged, the defense must be pleaded, and the facts constituting the privilege must be set forth in the answer in order that the plaintiff may be advised of the defense; and the issue is for the jury." See also, *Swan v. Thompson*, 124 Cal. 193 [56 Pac. Rep. 878]; *Hess v. Sparks*,

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44 Kan. 470 [25 Pac. Rep. 580]; *Harper v. Harper*, 73 Ky. (10 Bush) 447; *Stevenson v. Ward*, 48 App. Div. 291 [62 N. Y. Supp. 717].

In the case of *Mauk v. Brundage*, *supra*, the court says:

"It follows that the burden assumed by the plaintiff under the pleadings was simply to show the publication by the defendants * * * and that the plaintiff was the physician referred to, and understood by the community to be such physician. On such showing he was entitled to recover at least such compensatory damages as were attributable to the publication."

This ruling would appear to be in accord with the provisions of Sec. 5093 Rev. Stat. Of course, if the petition had alleged that the statement claimed to have been made by the defendant was pertinent or material to the issues on trial before the court, then there can be no doubt that the petition on its face would disclose an absolute privilege which would be a bar to any recovery, and the demurrer would, under such circumstances, have to be sustained. But in the absence of such an averment the court cannot assume or presume that the statement, libelous on its face, was pertinent or material to the issue, where it appears that the plaintiff was not a party, witness, counsel or court, and for the reasons given the demurrer to the first cause of action must be overruled.

As to the third cause of action, the defamatory matter consists of a series of questions propounded to a witness, D. S. Creamer, with reference to plaintiff, and as to these questions it appears that they are actionable *per se*, and the same averment as to them is made as was made with reference to the statement in the first cause of action—that they were in no manner pertinent to the issues. For the reasons above given the demurrer to this cause of action is also overruled, as there is no averment in the third cause of action which shows that plaintiff comes within the class of persons concerning whom an attorney is privileged to make false and malicious statements in the trial of a cause upon the ground that his privilege is absolute.

As to the second and fourth causes of action being for an alleged libel of the identical slanderous statements set forth in the first and third causes of action, the petition avers that the defendant being counsel for said Harry Kohn "did compose, write and publish by means of the stenographer of the court, employed according to law, to reduce to writing all things said upon said trial by the court, counsel on either side, the parties and witnesses to make the same a part of the record and proceedings in said cause for public announcement and the preservation of the records of said trial, the following composed, written and published false and malicious and defamatory words following, to-wit: (Here follows the defamatory matter), the court is of the opinion that the averments do not disclose that defendant was responsible for the

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publication as a libel of said matter. There is no averment that defendant directed or required the court stenographer to write down his statements, nor does it appear that the court stenographer was a servant or employe of defendant, or under the control and direction of defendant any more than a stranger. The court will take judicial notice of the fact that the court stenographer was not under the direction and control of defendant, and in the absence of an averment that defendant directed and ordered the court stenographer to write down what defendant said, it is the opinion of the court that defendant cannot be held liable for what the court stenographer wrote, and for this reason the demurrer to the second and fourth causes of action will be sustained.

BONDS—INSURANCE—WORDS AND PHRASES.

[Lorain Common Pleas, May 7, 1909.]

GEORGE T. CUTTS, RECVR. v. A. B. SPEAR ET AL.

1. MISAPPROPRIATION OF FUNDS OF BANK HELD FRAUD OR DISHONESTY AMOUNTING TO EMBEZZLEMENT OR LARCENY.

The "fraud or dishonesty" of a bank cashier "amounting to embezzlement or larceny" for which a fidelity and guaranty company promises "to make good and reimburse" comprehends such dishonest and fraudulent conduct resulting in loss as is equivalent to embezzlement or larceny and is not confined to the technical offenses mentioned or to such misappropriation of funds as would subject the cashier to a conviction for embezzlement or larceny.

2. RENEWAL OF INDEMNITY BOND EXTENDING INDEMNITY FROM YEAR TO YEAR.

An indemnity bond promising "during the term" of one year for which it is executed "or any subsequent renewal of such term" to reimburse and make good fraudulent and dishonest transactions and losses by a bank cashier, "committed during the continuance of said term, or any renewal thereof, and discovered during said continuance or any renewal thereof or within six months thereafter" is a continuous contract, extending the indemnity from year to year as distinguished from separate and distinct contracts for each year, and covers a misappropriation or fraud committed during the first year of the contract of indemnity but not discovered until six months after the bond had been renewed.

[Syllabus approved by the court.]

MOTION for new trial.

Squire, Sanders & Dempsey and E. G., H. C. and T. C. Johnson, for plaintiff.

Carr, Stearns, Chamberlain & Royon and G. H. Chamberlain, Esq., for defendant, United States Fidelity & Guaranty Co..

WASHBURN, J.

Plaintiff, as receiver, representing the Citizens National Bank of Oberlin, Ohio, sued the defendants, A. B. Spear and the United States

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Fidelity & Guaranty Co., on a bond given by them to said bank in which said bonding company guaranteed the fidelity of the cashier of said bank. The term of the bond was from February 5, 1903, to February 5, 1904, and was continued in force by a renewal certificate from February 5, 1904, to February 5, 1905. The cashier, A. B. Spear, and the president of the bank had certain dealings with C. L. Chadwick, otherwise known as Cassie Chadwick, between February 5, 1903, and December 1, 1904, in which the bank lost more than \$150,000, practically all of said transactions occurring during the first year covered by said bond and none of them being discovered within six months after the expiration of said first year. Some of the directors of the bank learned as early as October, 1904, that said Chadwick had obtained at least \$150,000 of the bank's funds by means of alleged loans which the cashier and president had made to said Chadwick and which they represented to have been made in good faith and upon what they supposed was good security, and that said security was then doubtful and later proved to be worthless.

The three or four directors who had this information, and the cashier and president kept the matter secret from the other directors and made a vain attempt to collect the notes given by said Chadwick until the bank failed, the first Monday in December, 1904.

When the bank failed all of the directors learned that these over-loans had been made and that the security was probably worthless, but there was no evidence tending to show that anyone except the cashier and president, who were parties to the conspiracy, if there was one, knew that the books of the bank had been juggled, or that any conspiracy existed, or that the transactions with said Chadwick were fraudulent or dishonest so far as the cashier was concerned, except that at the meeting of the directors just before the bank failed the cashier, on being questioned, said that said loans had been made for the benefit of himself and the president of the bank, and not for the benefit of the bank.

A receiver took charge of the affairs of the bank at once and early in January, 1905, notified the defendant bonding company that said transactions of Spear, the cashier, were dishonest and fraudulent within the terms of said bond, and claimed that the bonding company was liable to the bank for \$15,000, the amount of said bond, and in February, 1905, filed proof of loss; and later, and within the time limit of said bond, this suit was begun.

The claim was also made that said Spear, during the first yearly term of said bond, in September, 1903, appropriated to his own use \$20,000 of the funds of said bank.

During the trial evidence was introduced tending to prove that when these loans were made a conspiracy existed between said Chadwick

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and the cashier and president of said bank and that the cashier and president personally profited thereby, and that the transactions were not regularly entered upon the books of the bank as legitimate transactions should have been, and that from time to time false entries were made, and that the books were juggled for the purpose of concealing said transactions.

The trial resulted in a verdict for the full amount of the bond and interest, and this matter is now before the court on a motion for new trial.

Two propositions only will be considered in this opinion: first, whether the transactions complained of were such as were covered by the terms of said bond, and, second, whether they were discovered within the time limited for their discovery by the terms of said bond.

The terms of the bond, so far as these questions are concerned, are as follows:

"The company shall, during the term above mentioned, or any subsequent renewal of such term * * * make good and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of said employe in connection with the duties of his office or position, *amounting to embezzlement or larceny*, and which shall have been committed during the continuance of said term, or any renewal thereof, and *discovered during said continuance or any renewal thereof or within six months thereafter*, * * * the company's total liability on account of said employe under this bond or any renewal thereof, not to exceed the sum of \$15,000."

The claim made in the petition was that said bank had suffered a pecuniary loss in the sum of \$150,500 by reason of the fraud and dishonesty of A. B. Spear in connection with the duties of his office and position as cashier of said bank, amounting to embezzlement or larceny, in that said A. B. Spear conspired with, aided and assisted one C. L. Chadwick in fraudulently obtaining from the bank on certain dates certain sums of money by certifying as good, checks offered by said Chadwick on said bank and by issuing to said Chadwick drafts on the New York depository of said bank, payable to the order of said Chadwick, when, as a matter of fact, said Chadwick had no funds in said bank and the bank was not indebted to her in any way or in any sums whatever, nor had the directors or officers of said bank authorized Spear to loan said Chadwick the sums aforesaid or any part thereof, all of which was well known to said A. B. Spear and said C. L. Chadwick at the time; and it was further claimed that said Spear on or about September 28, 1903, unlawfully and without any right so to do, appropriated to his own use the sum of \$20,000, being the property of said bank.

The claim of the defendant is that unless such transactions constituted technical embezzlement or larceny they were not covered by the

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terms of said bond and that the petition failed to charge embezzlement or larceny and the proof failed to establish either.

Passing the question of whether or not the proof established technical embezzlement or larceny, let us consider what was meant by the parties when in making said contract they used the language "fraud or dishonesty of said employe amounting to embezzlement or larceny." If only technical embezzlement or larceny was meant, then the expression "fraud or dishonesty amounting to," was entirely superfluous, and such a construction must necessarily give no force and effect to those words. In my judgment the language of the bond meant more than just technical embezzlement or larceny, it meant such dishonest and fraudulent conduct resulting in loss as was "equivalent" to embezzlement or larceny.

Was there at the time this contract was made a species of fraud and dishonesty more or less common among cashiers which, while not technically embezzlement or larceny, "amounted" to the same thing? If there was, isn't that what was meant by the above expression, which would otherwise be meaningless? Misapplication of the funds of national banks by cashiers, under circumstances where it was impossible to convict them of embezzlement or larceny, occurred so frequently that congress was led to amend the embezzlement and larceny statute so as to make misapplication of the funds of a bank amount, so far as penalty was concerned, to the same thing as embezzlement or larceny. See U. S. Stats. Sec. 5209.

There can be no question that the transactions of Spear, if wilfully fraudulent or dishonest, constituted a misapplication of the funds of the bank, and that I understand to be conceded by counsel for defendant, and, in my judgment, was fraud and dishonesty amounting to embezzlement or larceny within the meaning and contemplation of the parties when said contract was made. This view is strengthened by a consideration of the object of the contract and the well settled rules of construction applicable thereto. It was a contract of indemnity and should be reasonably construed so as to give effect to the express words, and all the express words, if possible, of the parties, and not defeat their intention, and "if the policy is open to two interpretations which are equally fair, that one should be preferred which would give to the insured the greater indemnity. *German Ins. Co. v. Schild*, 69 Ohio St. 136 [68 N. E. Rep. 706; 100 Am. St. Rep. 663]; *West v. Insurance Co.* 27 Ohio St. 1 [22 Am. Rep. 294].

"Being contracts of indemnity against loss such contracts should be liberally construed in favor of the object sought to be attained; and when a clause is susceptible of two interpretations which seem equally fair, that should be preferred which affords the greater indemnity, but, like other contracts, they should receive a reasonable construction in

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order to carry out the presumed intention of the parties as expressed by the language used." *Livington v. Fidelity & Dep. Co.* 76 Ohio St. 253, 264 [81 N. E. Rep. 330].

A surety on a bond like this "is regarded as an insurer, whose contract, being drawn by the surety himself, and for a money consideration, is, if ambiguity exists in the language, to be resolved most strongly against the surety." *Bryant v. Bonding Co.* 77 Ohio St. 90, 99 [82 N. E. Rep. 960].

For some other authorities along the same line, outside of the state of Ohio, see *Booth v. Commonwealth*, 113 S. W. Rep. 61 (Ky.); *French v. Fidelity & C. Co.* 115 N. W. Rep. 869 (Wis.); *Cook v. Benefit League*, 76 Min. 382 [79 N. W. Rep. 320]; *Travelers Ins. Co. of Hartford v. Murray*, 16 Col. 296 [26 Pac. Rep. 774; 25 Am. St. Rep. 267]; *Arnold v. Insurance Co.* 3 Ga. 685 [60 S. E. Rep. 471]; *Insurance Co. of N. A. v. De Loach*, 3 Ga. App. 807 [61 S. E. Rep. 406]; *Royal Union Life Ins. Co. v. McLendon*, 62 S. E. Rep. 101 (Ga.); *Hatch v. Casualty Co.* 197 Mass. 101 [83 N. E. Rep. 398; 14 L. R. A. (N. S.) 503]; *Cutting v. Insurance Co.* 85 N. E. Rep. 174-5 (Mass.); *Dresser v. Insurance Co.* 70 Atl. Rep. 39 (Conn.); *American Surety Co. v. Pauly*, 170 U. S. 133 [18 Sup. Ct. Rep. 552]; *Title Guar. & Sur. Co. v. Bank*, 117 S. W. Rep. 537 (Ark.).

It may be claimed that if the cashier entered into a conspiracy with said Chadwick to defraud said bank and in carrying out such conspiracy they did do that which constituted larceny of the funds of the bank on the part of said Chadwick, then it would be larceny on the part of the cashier, but under the foregoing rules of construction it is my judgment that the bond covered the acts of the cashier even though they were not such as to subject him to a conviction for larceny, provided they were such as were equivalent to embezzlement or larceny. *City Trust, Safe Dep. & Sur. Co. v. Lee*, 204 Ill. 69 [68 N. E. Rep. 485]; *Champion Ice Mfg. & C. S. Co. v. Bonding & Tr. Co.* 115 Ky. 863 [75 S. W. Rep. 197; 103 Am. St. Rep. 356]; *American Bond & Tr. Co. v. Harvester Co.* 91 Md. 733 [48 Atl. Rep. 72]; *Frost, Guar. & Sur.* 117; 19 Cyc. 518.

In view of the terms of this contract and the foregoing rules of construction, I do not think that this court erred when it charged the jury as follows:

"As I have said, the claim is that there was a conspiracy between the said Spear and the said Chadwick whereby said Chadwick was to unlawfully obtain the money of said bank, when both said Spear and said Chadwick knew that the bank was not indebted to said Chadwick and knew also that neither the officers or directors of said bank had authorized said Spear to loan or to pay to said Chadwick any sums whatever, and that the design of said Spear and said Chadwick was to defraud said bank.

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“Was there such a conspiracy? Did they, designing to defraud said bank, agree to do those things which would enable said Chadwick by means of unlawful and fictitious transactions to obtain the funds of said bank and appropriate them to her or their use, when Spear had no right to pay or loan the funds of the bank to her? If so, then there was a conspiracy which, if resulting in loss to the bank, would amount to larceny or embezzlement within the terms of said bond. Or were the transactions merely loans, which, although unauthorized, were made in good faith, without profit to said Spear and with no intention to defraud the bank? If so, then there was no such conspiracy which, although loss resulted to said bank, would amount to larceny or embezzlement within the terms of said bond. An agreement merely to loan and actually loaning in good faith to said Chadwick a greater amount than the bank was authorized to loan to one person, would not be a transaction covered by the terms of said bond.

“Under the bond in question the defendant bonding company would not be liable for any mere error of judgment or *bona fide* mistake, or any injudicious exercise of discretion on the part of said Spear in and about all or any of the matters wherein he had been vested with discretion by said bank, either by instructions or by the rules and regulations of said bank. The gist of the matter is a design to defraud the bank, and if said Spear and Chadwick had that common design and each performed a part necessary to carry that design into execution, and the result of that design and the carrying of it into execution was a loss to the bank, and an appropriation of the funds of the bank to the use of the conspirators, it would be covered by the bond, even though a large part of the funds procured from said bank in carrying out said design was appropriated to the use of said Chadwick and not to the use of said Spear.”

The jury was also charged in reference to the claim that Spear had appropriated to his own use \$20,000 of the funds of the bank.

The next question is as to the time within which the fraud or dishonesty must have been discovered in order to hold the defendant liable on said bond, the claim of the defendant being that a fraud committed during the first year of the contract must have been discovered during that year or within six months thereafter and immediately reported to the company, and if not discovered within that time that the company would not be liable under said bond although the bond was continued in force at the time of such discovery.

The language of the bond is that the company shall “during the term above mentioned or any subsequent renewal thereof” make good the loss suffered “during the continuance of said term, or of any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter.” The renewal certificate by its terms

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"continued" said bond in force for another year, as was contemplated should be done and was provided for by the terms of said bond. The bond also contained a provision whereby the company could put an end to the contract on giving a month's notice in writing.

Giving to the language used by the parties in making their contract its ordinary, common-sense meaning, it seems plain that they contemplated and intended a contract which would probably be continued from year to year, and if it was so continued that it should be one contract, with but one penalty, and they used apt and appropriate language to express that intention. What, then, did they mean by the provision that the fraud resulting in loss should be discovered during the continuance of said original term "or any renewal thereof, or within six months thereafter?" In view of the fact that liability under the bond is limited to one penalty no matter how many times renewed or how long continued, the above language, when fairly construed, plainly expresses an intention to make the bond cover all loss discovered during the time the bond was in force or within six months thereafter. If we are to construe the contract fairly, but when in doubt, so as to "afford the greater indemnity" and "most strongly against the surety," how can the language of the parties be held to mean that a fraud resulting in loss during the first year must be discovered during that year or within six months thereafter? If such was the intention of the parties it would have been very easy to have used language plainly expressing such intention; certainly language which apparently expresses the opposite intention cannot be so construed without violating the rules of construction heretofore mentioned.

But the construction claimed by the defendant is required, it is said, because each renewal constitutes a separate contract. That is not true, except in a limited sense. All the terms of the contract, except that for its continuance in force after the first year, were carefully provided for, so that it would be a new contract only in reference to time; as to all other matters it was merely to be continued in force. The renewal certificate which was issued by the defendant provided that the contract was "continued" in force, but no additional penalty was provided for; the "renewal" was a new contract only in the sense of extending the indemnity of the original bond to another year, but there really was but one bond, with one penalty.

If within two months after the bond was renewed it had been discovered that the employe had embezzled during the first year more than the amount of the penalty of the bond, and also after the renewal he had embezzled more than the amount of the penalty of the bond, there could be but one recovery under the terms of the bond. If the original contract and the renewal thereof constituted separate contracts, then under such circumstances there should be two recoveries, as two were paid for

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by the insured, but the bond binds the defendant fidelity company to pay but one penalty, which negatives the idea of two separate contracts.

Taking into consideration all of the provisions of this bond and interpreting it according to the rules heretofore referred to, I am of the opinion that it was the intention of the parties to enter into a contract which when renewed should be continuous, and not two contracts, and that a loss insured against, which was discovered while the contract was in force or within six months thereafter, would be covered by the bond. *First Nat. Bank v. Fidelity & Guar. Co.* 110 Tenn. 10 [75 S. W. Rep. 1076; 100 Am. St. Rep. 765]; see also, *United States Fidelity & Guar. Co. v. Bank*, 233 Ill. 475 [84 N. E. Rep. 670]; *Fidelity & Deposit Co. v. Ice Mfg. & C. S. Co.* 117 S. W. Rep. 393 (Ky.). Such was the ruling at the trial. A *contra* holding may be found in *De Jernette v. Fidelity & Cas. Co.* 98 Ky. 558 [33 S. W. Rep. 828], but the bond in that case contained certain provisions that are not found in the bond now under consideration. That bond contained this provision:

"Any claim made under this bond or any renewal thereof shall embrace and cover only acts committed during its currency, and within twelve months next before the date of the discovery of the act or default upon which such claim is based."

In the renewal receipt there was used language as follows:

"The contract under bond No. 53,939 is hereby renewed in accordance with the terms of the bond, the guaranty to cover the period above named only."

It thus appeared that it was the intention of the parties to treat the renewal as a separate contract and that the protection afforded by the renewal should be limited to the terms of the renewal. These provisions distinguish that case from the case at bar and are quoted and relied upon by the court in arriving at the conclusion that each renewal constituted a separate contract. It will be noticed, also, that the contract was "renewed" and not "continued," as in the case at bar.

A like result was reached in a case decided by the supreme court of Georgia in 1902, *Mayor of Brunswick v. Harvey*, 114 Ga. 733 [40 S. E. Rep. 754], but the bond in that case contained a provision that upon the issuance by the company of any subsequent bond guaranteeing the fidelity of the treasurer, the liability under the original bond should cease and determine, so that no two bonds should be operative at the same time. It will be noted, also, in that case that an attempt was made by amendments to treat the renewals as separate contracts and recover the full penalty upon each of the renewals. It was held that under the provisions of that particular bond it was terminated by the subsequent renewals and the latter were, in fact, new and distinct contracts which adopted by reference all the terms and conditions of the first bond, and there being a provision in the bond that liability under the original bond

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should cease and determine upon the giving of a new bond so that no two bonds should be operative at the same time, the company was not held liable under the original bond for a loss not discovered until more than six months after the expiration of such original bond.

The provision as to a new bond plainly referred to renewals and there the parties used language indicating that they intended that the renewals should be treated as new bonds, that is, as separate and distinct contracts.

The absence of such a provision in the case at bar and the continuance of the original bond instead of a renewal of the same, renders the terms of the bond at least ambiguous and subject to the rules of construction heretofore referred to.

Then there is a case, *Proctor Coal Co. v. Fidelity & Guar. Co.* 124 Fed. Rep. 424, in which the United States circuit court for the northern district of Georgia held that the renewals did not operate as a continuing contract, but that each renewal was a separate and distinct obligation. But among the provisions of that bond was a provision which declared that on the issuance of a subsequent bond or renewal responsibility on any other bond should cease; it being the intention that only the last bond should be in force at any one time. In that case the court determined that "the original bond and each renewal stand for the malfeasance of the employe during the continuance of each and discovery within six months after the termination of each."

It may be that such conclusion might have been reached had not that provision been in the bond, but it seems that to reach such a conclusion where the bond does not contain such provision is merely construing the bond in favor of the insurance company and in accordance with what might be considered its intention without taking into consideration the purpose and intention of the insured.

It appears that the defendant bonding company in the case at bar was the defendant in the case last above referred to, and it may be that the above provision was omitted from the bond in question because the company thought that it was unnecessary. It is evident that the insertion of it would tend to reveal to applicants the company's intention to limit its liability on the original bond to losses discovered within six months after the expiration thereof and thereby be likely to deter them from making such contracts. Considering the omission of that provision or any provision which would plainly reveal such to be its intention, the court is not justified in declaring that such was its intention when the language used indicates an opposite intention. If the language "discovered during said continuance or any renewal thereof or within six months thereafter" is susceptible of a double meaning, then it is susceptible of two interpretations which seem equally fair, and in that

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event it should receive that construction which affords the greater indemnity.

Irrespective of authorities, it is my opinion that the language used in this bond does not make it plain that the parties intended that the loss should be discovered within the limits claimed by the defendant, but on the contrary that the insured at least intended and was justified in expecting that the insurer would make good a loss discovered at any time the bond was in force either as an original bond or as a continuance of the same, and that therefore an ambiguity existed which should be resolved most strongly against the surety. There being no adjudications in Ohio which govern the court in the determination of this question, I have concluded to follow my own convictions of what this contract ought to be construed to mean under the rules of construction laid down by our Supreme Court.

The question of when the discovery was made and whether timely and proper notice was given in accordance with the terms of the bond, were peculiarly jury questions, and were submitted to the jury and determined in favor of the plaintiff.

The motion for new trial will be overruled.

The defendant, the United States Fidelity & Guaranty Co., excepts.

SPECIFIC PERFORMANCE.

[Hamilton Common Pleas, May 1, 1909.]

ERNESTINE WERTHEIMER V. MINNIE KORTE.

1. SPECIFIC PERFORMANCE CANNOT BE ENFORCED AGAINST PURCHASER OF GRANTEE OF PARTITION DEED HAVING NO MARKETABLE TITLE.

Specific performance of a doubtful title cannot be enforced against a purchaser; accordingly, a grantee by sheriff's deed at partition sale in which no summons was issued against a judgment creditor of a partitioner, no appearance or answer by the creditor in such proceedings, has no marketable title to the property for which specific performance may be decreed against a purchaser from the holder of such deed.

2. CONTRACT REQUIRING PAROL VARIATION OF DESCRIPTION NOT CONTROLLED BY MAXIM, *ID CERTUM EST QUOD CERTUM REDDI POTEST*.

The maxim, *Id certum est quod certum reddi potest*, does not apply, in a suit for specific performance, to a description of property requiring the enforcement of a parol variation of a written contract for the conveyance thereof; a description containing nothing to indicate the location of property, except the city where the contract is dated, and the corner of two streets named, requires extraneous testimony to designate with any degree of certainty its location.

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3. TENDER OF DEED BEFORE SUIT BROUGHT ESSENTIAL TO ENFORCEMENT OF SPECIFIC PERFORMANCE.

Failure to make tender of deed upon contract to convey land until after suit brought to recover option paid on the contract, prevents recovery on cross petition for specific performance therein.

[Syllabus approved by the court.]

Schorr & Wesselman, for plaintiff:

Cited and commented upon the following authorities. *Wiedemann Brew. Co. v. Maxwell*, 78 Ohio St. 54 [84 N. E. Rep. 595]; *Wilks v. Railway*, 79 Ala. 180; *Linn v. McLean*, 80 Ala. 360; *Ross v. Parks*, 93 Ala. 153 [8 So. Rep. 368; 11 L. R. A. 148; 30 Am. St. Rep. 47]; *Sayward v. Houghton*, 119 Cal. 545 [51 Pac. Rep. 853]; *Guyer v. Warren*, 175 Ill. 328 [51 N. E. Rep. 580]; *Wilcox v. Cline*, 70 Mich. 517 [38 N. W. Rep. 555]; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Watson v. Coast*, 35 W. Va. 463 [14 S. E. Rep. 249]; *Dailey v. Can Co.* 128 Mich. 591 [87 N. W. Rep. 761]; *Ide v. Leiser*, 10 Mont. 5 [24 Pac. Rep. 695; 24 Am. St. Rep. 17]; *Black v. Maddox*, 104 Ga. 157 [30 S. E. Rep. 723]; Jones, Evidence Secs. 444, 445; *Dye v. Scott*, 35 Ohio St. 194 [35 Am. Rep. 604]; *Monnett v. Monnett*, 46 Ohio St. 30 [17 N. E. Rep. 659]; Maupin, Mark. Tit. Sec. 5, p. 20; *Merritt v. Horne*, 5 Ohio St. 307 [67 Am. Dec. 298]; *Thatcher v. Dickinson*, 2 Circ. Dec. 82, (3 R. 144); *Commercial Bank v. Buckingham*, 12 Ohio St. 402; *Spoors v. Coen*, 44 Ohio St. 497 [9 N. E. Rep. 132]; *Parmenter v. Binkley*, 28 Ohio St. 32; *Southward v. Jamison*, 66 Ohio St. 290 [64 N. E. Rep. 135]; *Bailey v. Young*, 11 Circ. Dec. 257 (20 R. 546); *Fletcher v. Holmes*, 25 Ind. 458; *Lapp v. Lumber Co.* 11 Circ. Dec. 628 (21 R. 191); Sugden, Vendors 577; *Eleventh St. Church v. Pennington*, 10 Circ. Dec. 74 (18 R. 408); *Kellerman v. Government Loan & Bldg. Assn.* 7 Dec. 408 (39 Bull. 203); *Tiffin v. Shawhan*, 43 Ohio St. 178 [1 N. E. Rep. 581]; *Irving v. Campbell*, 121 N. Y. 353 [24 N. E. Rep. 821; 8 L. R. A. 620]; *Abbott v. James*, 111 N. Y. 673 [19 N. E. Rep. 434]; *Kilpatrick v. Barron*, 125 N. Y. 751 [26 N. E. Rep. 925]; *Sohier v. Williams*, 1 Curt. C. C. 479 [22 Fed. Cas. 772].

Ben. B. Dale, for defendant.

GORMAN, J.

This is an action brought by plaintiff to recover from the defendant \$100 on account of a part payment of purchase money for a certain lot alleged to have been the subject of a contract of sale between the parties. On May 20, 1907, the following writing was executed by the parties to this action, viz:

"Cincinnati, May 20, 1907.

"For and in consideration of \$100 to me paid by Mrs. Ernestine Wertheimer, I hereby give the said Mrs. Ernestine Wertheimer ———

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days or until July 10, 1907, to purchase my property located at S. W. Cor. Hapsburg & Woodburn Ave., city, for the sum of \$4,900. It is agreed and understood that the mortgage now recorded against said property is to be paid and cancelled by me. All assessments and taxes against said property to be paid by the said Mrs. Ernestine Wertheimer, except the tax due and payable in June, 1907, amounting to \$36.53. If the said Mrs. Ernestine Wertheimer decides to purchase within the above limited time, the \$100 which she has paid is to apply on the purchase price \$4,900 and if said option is not closed on or before July 10, 1907, the sum \$100 will be forfeited.

"Signed MINNIE KORTE.

"Accepted Ernestine Wertheimer."

Plaintiff avers that the property designated is in the city of Cincinnati at the southwest corner of said streets named in the agreement fronting thirty-four feet on Woodburn avenue and that the acceptance of the above option was on the day of the execution thereof May 20, 1907, and that thereupon said option became an executory contract of sale for said premises. Plaintiff further avers, that the title to said real estate is unmarketable and that by reason thereof she is not bound to accept a conveyance of the same. She sets out in her petition at length the reasons why she claims the title to be unmarketable and concludes her petition by a prayer for the recovery of a judgment for \$100 against defendant, the sum paid on account of said purchase price. Defendant answers denying that the title is unmarketable, but admitting all the other allegations of the petition. And by way of cross petition she sets up the contract and asks for a specific performance thereof, alleging that she has been ready and willing at all times to perform said agreement on her part and that she is the owner of the property described in the petition and has duly tendered a deed to plaintiff and her attorney for said premises and demanded the payment of the balance of the purchase money but that plaintiff has refused to accept the deed or pay the money. The parties agreed to try the case to the court without a jury on the suggestion of the court that the case made out in the petition is one for a jury.

The evidence disclosed that the acceptance of the option and the payment of the \$100 were both on the day the option is dated and that the petition was filed August 12, 1907, and the tender of the deed and demand for the balance of the purchase money were made on September 12, 1907, and the answer and cross petition was filed the next day, September 13, 1907. It further appeared from the evidence that the defendant, Minnie Korte, acquired her title to the lot in question by a sheriff's deed from the sheriff of Hamilton county, dated February 18, 1904; that said deed was executed and delivered

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in pursuance of a decree of the court of common pleas of Hamilton county, Ohio, in cause No. 121778, *Louisa M. Voss v. Frank J. Moormann et al.*; that said action was one for partition; that among the defendants were Robert A. Moormann, one of the tenants in common, and Jane F. T. Sargent, a judgment creditor of said Robert A. Moormann, who was made party defendant and asked to set up her judgment against said Robert A. Moormann; that summons was issued on the petition in said cause notifying all the defendants that the action was one for partition.

Said action was commenced on August 5, 1901, and on August 29, 1901, Jane F. T. Sargent filed her answer and cross petition against her codefendant, Robert A. Moormann, praying therein for the allowance of her judgment claim against Robert A. Moormann out of his share of the proceeds of the real estate sought to be partitioned in said cause: No summons was ever issued on this cross petition nor did Robert A. Moormann ever enter his appearance or plead to said cross petition; on February 24, 1903, a decree was entered in said cause on the cross petition of said Jane F. T. Sargent wherein the court found that said Jane F. T. Sargent had recovered a judgment against said Robert A. Moormann by the consideration of the superior court of Cincinnati in cause No. 50078 in the sum of \$2,822.64; that the allegations of the answer and cross petition were true and that said judgment of Jane F. T. Sargent became and was the first and best lien on the share and interest of Robert A. Moormann in the estate sought to be partitioned in said cause No. 121778; that said Robert A. Moormann elected to take the premises described in the petition in the case at bar at the appraised value thereof but no deed of conveyance was ever made to him by the sheriff of Hamilton county for said premises as provided by Sec. 5763 Rev. Stat.; that said premises were advertised, appraised and sold on the decree entered in said cause No. 121778 on the cross petition of Jane F. T. Sargent on January 9, 1904, long after the proceedings in partition had been fully determined and the case closed as to the partition proceedings; and that the defendant, Minnie Korte, purchased said premises at said sale for the sum of \$3,575 and received her deed from the sheriff for said premises as before stated.

The question presented to the court on this state of facts is whether or not the defendant should have specific performance of the contract against the plaintiff and if not should the plaintiff have judgment against the defendant for the sum of \$100 paid on account of the purchase price of the property.

It is a settled and invariable rule of equity that a purchaser shall not be compelled by a decree of court in a suit for specific performance, to accept a doubtful title. It has been said that the title which

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a purchaser is compelled to take ought, like Cæsar's wife, to be free from suspicion; although in some cases the rule has not been enforced with quite that degree of strictness. Section 378 Bispham's Principles of Equity; Maupin, Market. Tit. 705, *et seq.*

The proceedings in cause No. 121778 in this court whereby defendant acquired title to the property involved in the case at bar are open to the same objection as the proceedings in the recent case decided by the Supreme Court, *Southward v. Janison*, 66 Ohio St. 290 [64 N. E. Rep. 135], and in the opinion of this court, under the rule there laid down, the title of the defendant, Minnie Korte, to the property involved in the case at bar is to say the least doubtful and not marketable because of the failure to notify Robert A. Moormann or to cause summons to issue for him on the cross petition of Jane F. T. Sargent, there being no entry of appearance by him nor any answer to said cross petition. The court does not deem it necessary to cite any other authority on this proposition, as that case is, to the mind of the court, on all fours with the case at bar. Furthermore, the description of the property in the contract is so uncertain that a court of equity ought to hesitate before decreeing specific performance. There is nothing in the contract to indicate where the property is located except the place where the contract is dated "Cincinnati, Ohio." The dimensions of the lot are not given nor any lot number, and, in fact, no sufficient information to enable the court to designate with any degree of certainty what property the purchaser shall accept from defendant without the aid of extraneous testimony. It may be claimed that the maxim, *Id certum est quod certum reddi potest*, applies to the description and that parol evidence is admissible to show where the property is located and the description and boundaries thereof. The great weight of authorities is to the effect that specific performance of a written contract with a parol variation will not be enforced. This means that if there has been omitted from the contract a material matter it cannot be supplied by oral evidence. The ordinary principle of evidence in regard to contracts which have been reduced to writing, is that the intention of the parties is to be gathered solely from the written agreement and that no evidence can be admitted to show any verbal qualification of the writing. Cases of fraud and mistake are the only exception to the rule. Bispham's Equity, Sec. 381.

In the 26 Am. & Eng. Enc. Law (2 ed.) 129, this doctrine is laid down and supported by numerous authorities.

"It is well settled in an action for specific performance that parol evidence is admissible to identify the property conveyed, where this involves merely the application of an *adequate* description of the subject matter intended."

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"The rule is otherwise where an *insufficient description* is given or where there is *no description*. The courts it has been held never receive parol evidence both to describe the land and then apply *the description*." This is what the court would be called upon to do in the case at bar if specific performance were to be decreed. See cases cited under text in 26 Am. & Eng. Enc. Law (2 ed.) 129; Pomeroy, Spec. Perf. 159-161.

Furthermore, the evidence in the case shows that no tender of a deed was made by the defendant nor was a demand made for the purchase money until a month after this suit was commenced and under the authorities it is apparent that the cross petition sets up a claim not matured at the time the suit was commenced; and that only such actions can be set up by counterclaim, or set off as *could have been sued upon at the time the action was commenced*. No tender or demand having been made before the suit was commenced the court is of the opinion that there is grave doubt as to whether or not the defendant by way of cross petition can counterclaim on a cause of action that accrued after the suit was commenced. See Bates, Pl. & Pr. (new ed.) 379, 573, and cases there cited. *Carney v. Taylor*, 4 Kan. 178; *Burckle v. Eckhart*, 3 N. Y. 132.

Inasmuch as specific performance is not to be decreed as a matter of right, but rests in the sound discretion of the court, I am of the opinion that the specific performance of the contract involved in the case at bar ought not, and cannot, without the aid of parol evidence, be decreed. The judgment of the court therefore will be a dismissal of the cross petition at defendant's costs and a judgment for plaintiff for the sum of \$100 with interest from July 10, 1908, and costs. Let a decree be so entered.

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CRIMINAL LAW—INDICTMENTS.

[Hamilton Common Pleas, 1909.]

STATE OF OHIO v. WILLIAM STICHTENOTH.

1. MERE PRESENCE OF PROSECUTOR IN GRAND JURY ROOM DURING ITS DELIBERATIONS NOT SUFFICIENT TO SUSTAIN PLEA IN ABATEMENT.

A bare allegation in a plea in abatement of the mere presence of a prosecuting attorney or his assistant in the grand jury room during its deliberations or times of voting, unsupported by any evidence that such presence was prejudicial to accused, is insufficient to maintain the plea, notwithstanding Sec. 7195 Rev. Stat. provides that "no other person" shall remain in the room at such time, and that such phrase is construed to mean "no other person than the grand jurors."

2. PROSECUTING ATTORNEYS DENIED ADMISSION TO GRAND JURY ROOM DURING ITS DELIBERATIONS AND VOTING.

A prosecuting attorney or assistant prosecuting attorney, under Sec. 7195 Rev. Stat., has the right at all times to appear before grand jury for the purpose (1) of giving information relative to any matters cognizable by it; (2) of advising it upon any legal matter when required; (3) of interrogating witnesses before the grand jury when it or he deems it necessary; but he has no right to remain in the room with the grand jury while its members are expressing their views or voting on any matter before the jury.

[Syllabus approved by the court.]

H. T. Hunt, Pros. Atty., for plaintiff:

Cited and commented upon the following authorities: *Regent v. People*, 96 Ill. App. 189; *Shoop v. People*, 45 Ill. App. 110; 1 Bishop, Crim. Proceed. Sec. 861, 862, citing *Gladden v. State*, 12 Fla. 562; *Commonwealth v. Bradney*, 126 Pa. St. 199 [17 Atl. Rep. 600]; *Gitchell v. People*, 146 Ill. 175 [33 N. E. Rep. 757; 37 Am. St. Rep. 147]; Horton, Crim. Pl. & Pr. Sec. 686; *State v. Baker*, 20 Mo. 338; *State v. Adam*, 40 La. Ann. 745 [5 So. Rep. 30].

M. G. Heintz, for defendant.

BROMWELL, J.

On March 31, 1909, the grand jury of this county reported an indictment of embezzlement against William Stichtenoth.

On April 9, 1909, the defendant filed a plea in abatement in the following words:

"Now comes the defendant, William Stichtenoth, and says that the state of Ohio ought not further to prosecute the indictment herein against him, because he says that during the deliberations of the grand jury at the January term, 1909, of Hamilton county, Ohio, by which grand jury the indictment here was returned against this defendant; that Henry T. Hunt, the prosecuting attorney of Hamilton county,

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Ohio, and John W. Weinig, an assistant prosecuting attorney of Hamilton county, Ohio, were present with said grand jury in the grand jury room and that said Henry T. Hunt, prosecuting attorney, and said John W. Weinig, assistant prosecuting attorney, participated with said grand jury in the deliberations in and about the indictment herein. That said presence of said prosecuting attorney and said assistant prosecuting attorney, and their participation in said deliberations, was contrary to law and was prejudicial to this defendant. And this, he, the said William Stichtenoth, is ready to verify; wherefore he prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictment specified."

This plea was properly signed and verified.

To this plea the prosecuting attorney, Henry T. Hunt, on behalf of the state of Ohio, filed an amended reply on April 10, 1909, in the following words:

"Plaintiff, by Henry T. Hunt, prosecuting attorney of Hamilton county, Ohio, for reply to the plea in abatement heretofore filed herein, admits that Henry T. Hunt, prosecuting attorney of Hamilton county, Ohio, and John W. Weinig, assistant prosecuting attorney of Hamilton county, Ohio, were present in the grand jury room during the deliberations of the said grand jury in and about the indictment herein, but denies each and every other allegation in said plea in abatement.

Wherefore, plaintiff prays that said plea in abatement be overruled and that plaintiff be required to plead to the indictment herein."

No further pleading has been filed by or on behalf of the defendant.

The question under consideration, therefore, comes before the court as if upon demurrer to the amended reply to the plea in abatement, and raises the sole question as to whether the mere presence of the prosecuting attorney or his assistant in the grand jury room during the deliberations of the grand jury and a bare allegation in the plea in abatement, unsupported by any evidence, that such presence of the prosecuting attorney or his assistant was prejudicial to the defendant, is sufficient to maintain the plea in abatement.

Reserving for further consideration the question as to the right of the prosecuting attorney or his assistant to be present in the grand jury room with the grand jury during their deliberations, we shall first dispose of the question above presented by the pleadings in this case.

The section of the statutes which requires a construction in passing upon the question raised in this case is Sec. 7195 Rev. Stat., which reads as follows:

"The prosecuting attorney, or assistant prosecuting attorney, shall be allowed at all times to appear before the grand jury, for the purpose

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of giving information relative to any matter cognizable by it, or advise upon any legal matter when required; and he may interrogate witnesses before the jury when it or he deems it necessary; but no other person shall be permitted to remain in the room, with the jury while the jurors are expressing their views, or giving their votes, on any matter before them." * * *

No question is raised as to the proper interpretation of the first part of this section, namely: the right of the prosecuting attorney or assistant to appear before the grand jury at all times for the purpose of giving information relative to any matter cognizable by it, or advise upon any legal matter when required, nor upon his right to interrogate witnesses before the grand jury when it or he deems it necessary, but as to the remainder of the section cited above, and particularly as to the meaning of the phrase, "*no other person*," some doubt has arisen as to whether the *no other person* referred to means *no other person than the prosecuting attorney*, or whether it means *no other person than the grand jurors*. If this phrase is to be construed as no other person than the prosecuting attorney or his assistant, there can be no doubt as to the right of the prosecutor or his assistant to be present in the room with the grand jury while the jurors are expressing their views and giving their votes, and in the absence of any allegation in the plea in abatement that the prosecutor was guilty of any improper conduct in attempting to influence the grand jurors in bringing in an indictment which they would not otherwise have returned, the plea would have to be overruled.

But if the phrase "*no other person*" is to be construed as meaning no other person than the grand jurors, then neither the prosecuting attorney nor his assistant would have the right to remain in the room with the jury while the jurors were expressing their views or giving their votes on any matter before them, and the question would then arise as to whether he, (the prosecuting attorney having admitted in his reply that he was present in the grand jury room during the deliberations of the grand jury), so prejudiced the rights of the defendant as to influence the grand jury to bring in an indictment which they would not otherwise have done in the case now under consideration.

The general principle relative to pleas in abatement is, that being dilatory pleas they are not favored by the law and must be strictly construed. Mere irregularities in matters of procedure without evidence that such irregularities so deprived the defendant of his constitutional or statutory rights as to prevent his making a proper defense to the charges set out in the indictment, would not be sufficient to warrant a discharge of the indictment and a dismissal of the accused. Even

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direct violations of statutory prohibitions have in many cited cases been held insufficient to warrant such action.

With one or two exceptions this has been the uniform position taken by the courts as to the effect of such irregularities. In support of this view, I cite the following cases taken at random from the decisions in the courts of various states.

The Montana Statutes, Sec. 1788, uses this language:

"No person must be permitted to be present during the expression of their," (the grand jurors'), "opinion or giving their votes upon any matter before them."

Following this section is a note in these words:

"Their deliberations, however, while voting on finding a bill, should be private, but the effect of the presence of a third party at that time is not settled by the authorities. The better practice is to exclude all but members from the room at such time."

In the article on Grand Juries, 20 Cyc. Law & Proced. 1338, the compiler says:

"While it seems to be very generally regarded as the better practice, and the grand jury has a right to require that the prosecuting attorney shall retire from the room during its deliberations, and in some jurisdictions his presence is expressly forbidden by statute, the mere fact that, with the consent of the grand jury, he is present while the jurors are deliberating or voting on a charge, will not constitute such an irregularity as * * * will invalidate an indictment."

Edwards, Juries 128:

"But the fact that the district attorney was present during the deliberations of the grand jury and the taking of the vote is, at most, an irregularity and no ground for quashing the indictment in the absence of any averment and proof that the defendant was thereby prejudiced; likewise where, after certain persons had testified in a particular case the district attorney said, 'I suppose you do not want to hear any more.' "

Regent v. People, 96 Ill. App. 189:

"An indictment will not be quashed because of the presence of an assistant state's attorney before the grand jury when it was found."

Miller v. State, 42 Fla. 266 [28 So. Rep. 208]:

"The presence of assistant counsel, procured with the consent of the court, before the grand jury, during the examination of evidence, and his mere presence at the time a vote is taken on a bill, would not be sufficient ground, in the absence of any abuse shown, to set aside the indictment; but when such counsel, after remaining in the grand jury room during the examination of evidence and the deliberation of the jury in the case, including the time when the vote is taken, urges

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and requests the finding of the bill, the policy of the statute is violated, and the unbiased judgment of the jury on the merits of the case is invaded."

The Florida Statute under which this last decision was rendered, Statutes 1906, Sec. 3856, is as follows:

"Whenever required by the grand jury, it shall be the duty of the state attorney to attend it for the purpose of examining witnesses in its presence, or for giving it advice upon any legal matter and to issue subpoenas and other process to secure witnesses."

State v. Bates, 148 Ind. 610 [48 N. E. Rep. 2]:

"The mere fact that a stenographer employed by the prosecuting attorney, was present in the grand jury room and took down in shorthand the evidence on which the indictment was based, for the use of the prosecution, is not ground for quashing the indictment, unless it appears that the accused was prejudiced thereby."

This last case is cited for the reason that there was no provision of law at the time the decision was rendered, authorizing the presence of a stenographer at any time before the grand jury, and yet the court decided that the unauthorized presence of the stenographer would not vitiate the indictment in the absence of evidence showing that the defendant was prejudiced by such irregularity.

The Alabama statute, code 1907, Sec. 7306 refers to the prosecuting attorney in the following words:

"But he must not be present at the expression of their views or the giving of their votes on any matter before them."

Blevins v. State, 68 Ala. 92:

"An attorney is not authorized to go before the grand jury at the request of the solicitor and perform his duties; yet an indictment, so found, should not be quashed because of such unauthorized appearance of the attorney."

Hall v. State, 134 Ala. 90 [32 So. Rep. 750]:

Syl. 2. "In a criminal case, a plea in abatement to the indictment, which avers that while the grand jury which preferred said indictment was engaged in the examination and investigation of the pending case, the solicitor of the court expressed to them the opinion that the evidence before them was sufficient to warrant them in finding an indictment, and that it was their duty to indict the defendant, and that this influenced the grand jury, without which no indictment would have been preferred; and further that while said grand jury was in session and was so engaged in the investigation of said case, the judge of the court, at the request of the grand jury, appeared before them and advised them as to the law relating to the offense with which defendant

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was charged, is sufficient and subject to demurrer; the matters averred therein not being proper subjects for plea in abatement."

State v. Kimball, 29 Ia. 267:

"The mere presence of a bailiff of the court in attendance upon the grand jury during their investigation of a criminal charge is not a sufficient ground of objection against an indictment, if he was not present when the vote was taken upon the indictment."

In *Robinson Case*, 26 Parker's Criminal Reports 308:

"The sheriff had summoned a grand jury without a venire. The court held that this did not affect the substantial rights of the prisoner, and overruled the plea in abatement."

Agnew v. United States, 165 U. S. 36 [17 Sup. Ct. Rep. 235; 41 L. Ed. 624]:

Syl. 1. "A plea in abatement alleging irregularities in drawing grand jurors, filed two weeks after the court opened and five days after the indictment was returned, is too late when it does not allege any reason for the delay."

Syl. 2. "Such plea is fatally defective when, although it states that the drawing tended to defendant's injury and prejudice, no grounds are assigned for such conclusion, and the record does not show any."

Page 44: "A plea (in abatement) must be pleaded with strict exactness * * * the general rule is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception."

Commonwealth v. Bradney, 126 Pa. St. 199 [17 Atl. Rep. 600]:

Syl. 3. "While it is the duty of the district attorney, as well as his privilege, to attend upon the grand jury with matters upon which they are to pass, to aid in the examination of witnesses, and to give such general instruction as they may require, yet any attempt on his part to influence their action or to give effect to the evidence adduced, is improper and impertinent."

Syl. 4. "In the absence, however, of any participation of the district attorney in the deliberations of the grand jury, or of effort on his part to influence their finding, his mere presence in the jury room during their deliberations is not good ground for quashing the indictment."

Courtney v. State, 5 Ind. App. 356 [32 N. E. Rep. 335]:

"While the use of a stenographer by a prosecuting attorney for the purpose of taking down the statements of witnesses as they testified concerning an alleged offense before the grand jury, is not provided for by statute; and while there is an express statutory provision," (Sec. 1655 Rev. Stat., 1881), "that the grand jury must select one of their

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number as clerk and that said clerk, among other things, must take minutes of the evidence to be preserved for the use of the prosecuting attorney, still the use of such stenographer will not result in the abatement of a particular indictment without some showing that the accused was injuriously affected, or that something unauthorized was said or done which probably injured him."

State v. Brewster, 70 Vt. 341 [40 Atl. Rep. 1037; 42 L. R. A. 444], after citations from a large number of authorities, the court said:

"An examination of these decisions will make it clear, so far as observed, that the presence of a stranger in the room with the grand jury, when receiving the testimony of witnesses, with the exception of *State v. Bowman*, [90 Me. 363] 38 Atl. Rep. 331 [60 Am. St. Rep. 266], is never a cause for abating their indictment, unless the respondent avers and shows that he has been prejudiced thereby; and rarely will such presence when the jury are deliberating or voting, avail, unless the respondent is shown to have been prejudiced thereby in respect to the finding of the indictment."

United States v. Terry, 39 Fed. Rep. 355:

Syl. 4. "In the United States district court the mere fact that the district attorney was present during the expression of opinion of the grand jury upon the charge in the indictment, and during their voting thereon is, at most, an irregularity, which in the absence of averment of injury or prejudice to defendant, is a matter of form and not of substance."

It will be seen from the above citations that the authorities are practically unanimous that the mere presence of the prosecuting attorney or his assistant in the same room with the grand jury while the grand jurors are deliberating or casting their votes, and in the absence of any proof of misconduct on the part of these officers which resulted in prejudice to the accused or in the finding of an indictment which would not otherwise have been found, is not sufficient to sustain a plea in abatement and discharge the indictment.

While the accused in the present case alleges in his plea that the presence of the prosecuting attorney was prejudicial, he sets out no specific averments or allegations showing in what manner he was prejudiced and has submitted no evidence whatever to support the allegation in that regard. The court, therefore, finds upon the pleadings that the plea in abatement ought not to be sustained and therefore overrules the same.

While the above decision fully disposes of the question now before the court and nothing further need be said upon the only question raised in the case, in view of the apparent uncertainty or doubt as to the meaning of that clause of Sec. 7195 Rev. Stat., which determines

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the rights of others than grand jurors to be present in the grand jury room during their deliberations and while casting their votes, I think it may be of some interest and perhaps value to determine and construe said clause, and in so doing, to call attention to opinions of text writers, provisions of statutes and the decisions of courts so far as applicable.

While the grand jury system is an inheritance from the English law of procedure in criminal cases and was a part of the common law which was adopted in this country upon its settlement, and has been recognized as binding in the absence of statutory provisions in conflict therewith, there can be no doubt that each state has the right to regulate, by its constitution or statutes, the composition of grand juries, the duties they shall perform, their manner of procedure and all other matters relating thereto. The system of grand juries is almost universal throughout the United States, only a few states dispensing with them and the great majority having provisions largely identical with each other and closely similar to the common law provisions. In examining the decisions of the various states upon the rights and privileges of grand juries, reference must therefore be had to the laws of the state in which the decision was rendered, so that the language of the text writers will, in some instances, differ from that of others, and a decision in one state may not be good authority in another, because of the difference of the statutory provisions. Bearing this in mind, I shall first state the views entertained by some of the best known text writers as follows:

Thompson & Merriam, Juries:

Sec. 599. "The grand jury have a right at all reasonable times during the discharge of their duties, to apply either to the court or to the prosecuting attorney for advice. But this advice must be restricted to matters of law. Neither the court nor this officer can say to the jury that the facts as shown by the evidence are sufficient to authorize them to find a bill."

Sec. 629. "As to the modern English practice Mr. Chitty says: 'It is not unusual, except in the King's bench where the clerk of the grand juries attends them, to permit the prosecutor to be present during the sitting of the grand jury *to conduct the evidence on the part of the crown.*' "

It will be seen from this citation from Chitty just given, that the function of the prosecutor is merely that of conducting the evidence on the part of the crown and does not support the claim that the prosecutor has the right to be present during the deliberations and voting of the grand jury.

Thompson & Merriam, Juries:

Sec. 632. "It has been held that the fact that the prosecuting officer or his assistants were present during the deliberations and the

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voting of the grand jury, will not *per se* invalidate their finding.”— (*Shattuck v. State*, 11 Ind. 473.) “But the soundness of this decision may be doubted. *Their very presence at such time would seem to be an abuse of their official privilege.*”

Sec. 633. “In an early Connecticut case [*Lung’s Case*, 1 Conn. 428], the supreme court, in order to solve some doubts which had been expressed as to the power and duty of the grand jury, prepared a model charge, in which is found the following: ‘You will admit no counsel on the part of the state or of the prisoner.’ In a recent opinion of the supreme court of North Carolina [*Lewis v. Wake Co. (Comrs.)* 74 N. C. 194], it was bluntly said: ‘The solicitor has no business in the grand jury room.’”

It will be noticed that these two decisions just referred to are in states which have no statutory provision defining the right of the prosecutor to appear before the grand jury for any purpose, and therefore, they may be construed as the opinions of those courts upon the common law.

Same author; Sec. 634. “The statutes of a considerable number of states distinctly specify the duty and privilege of the prosecuting officer in the matter of attendance upon the grand jury. Thus, he must attend, when required by the grand jury, to examine witnesses; and so he may whenever he deems his presence necessary for this purpose. He must, also, when required by the grand jury, attend for the purpose of giving that body legal advice or information as to any matter connected with their duties; and so he may whenever he deems it necessary. *Neither he nor any other person can be present during their deliberations, or when the vote is taken upon any matter before them.* The presence of this officer upon excepted occasions gives the accused a right to demand that the indictment be set aside.” *Rothschild v. State*, 7 Tex. App. 519.

Edwards, Grand Juries 127:

“It is the general custom at the present day in all jurisdictions to permit the district attorney to attend the grand jury ([*Charge to Grand Jury*, 2 Sawy, 667] 30 Fed. Cas. 992 and others), but he has no right to be present during the deliberations of the grand jurors, and should withdraw if requested to do so; nor is it proper for him to attempt to control or influence the action of the grand jury or to say what effect should be given to the testimony adduced before them * * * If the district attorney should participate in the deliberations of the grand jury or make any effort to influence their finding, the indictment will be quashed.” *Commonwealth v. Bradney, supra.*

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“The relation which should be maintained between the district

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attorney and the grand jury is well stated by Mr. Justice Clark, [*Commonwealth v. Bradley*] 126 Pa. St. 199 [205]: 'The district attorney is the attendant of the grand jury; it is his duty as well as his privilege to lay before them matters upon which they are to pass, to aid them in their examination of witnesses, and to give them such general instruction as they may require. But it is his duty during the discussion of a particular case, and whilst the jurors are deliberating upon it, to remain silent. It is for the jury alone to consider the evidence and to apply it to the case in hand; any attempt on the part of the district attorney to influence their action or to give effect to the evidence adduced, is in the highest degree improper and impertinent. Indeed, it is the better practice, and the jurors have an undoubted right to require, that he should retire from the room during their deliberations upon the evidence and when the vote is taken whether or not an indictment shall be found or a presentment made.' * * *

"In the absence of any statute which grants this right to him, it would seem that *the common law rule is still in force and that the presence of the district attorney in the grand jury room even for the purpose of examining witnesses, is not by reason of his right, but as a matter of grace on the part of the grand jury.*"

Wilson's Works:

"Among all the plans and establishments which have been devised for securing the wise and uniform execution of the criminal laws, the institution of grand juries holds the most distinguished place. This institution is, at least in the present times, the peculiar boast of the common law. * * * In the annals of the world there is not found another institution so well adapted for avoiding all the inconveniences and abuses, which would otherwise arise from malice, from rigor, from negligence, or from partiality in the prosecution of crimes."

Wharton, Crim. Proced. & Prac. (9th ed.):

Sec. 366. "It is proper * * * to keep in mind the fact, already noticed, that the only valid basis on which the institution of grand juries rests, is that they are an independent and impartial tribunal between the prosecution and the accused and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality * * * and in any view the presence of the counsel for the prosecution, public or private, during the deliberations of the jury, should be ground for quashing the bill, unless it appear that there was no interference by such counsel in any degree with the freedom of such deliberations. The purpose of the institution of grand juries, was, as we have seen, to interpose a check upon the sovereign; and they would cease to answer this purpose, and would increase the danger they

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were intended to avert, if they should be put under the official direction of the prosecuting authorities of the state."

20 Cyc. Law & Proceed. 1338:

"Although in some jurisdictions the prosecuting attorney is not allowed in the grand jury room," *Lewis v. Wake Co. (Comrs.)*, 74 N. C. 194; *Lung's Case*, 1 Conn. 428, "the general rule is that he may be present before the grand jury," *Shoop v. People*, 45 Ill. App. 110; *State v. Aleck*, 41 La. Ann. 83 [5 So. Rep. 639]; *In re Bridge Appropriations*, 9 Kulp. (Pa.) 427; *United States v. Kilpatrick*, 16 Fed. Rep. 765; *In re District Atty.* 7 Fed. Cas. 745; *Charge to Grand Jury*, 2 Sawy. 667 [30 Fed. Cas. 992], "to assist in the examination of witnesses," *Blevins v. State, supra*; *Bennett v. State*, 62 Ark. 516 [36 S. W. Rep. 947]; *Gitchell v. People*, 146 Ill. 175 [33 N. E. Rep. 757; 37 Am. St. Rep. 147]; *State v. Kovolosky*, 92 Ia. 498 [61 N. W. Rep. 223]; *State v. Fertig*, 98 Ia. 139 [67 N. W. Rep. 87]; *Franklin v. Commonwealth*, 105 Ky. 237 [48 S. W. Rep. 986]; *State v. Adam*, 40 La. Ann. 745 [5 So. Rep. 30]; *State v. Judicial Dist. Ct.* 22 Mon. 25 [55 Pac. Rep. 916]; *People v. Scannell*, 36 Misc. 40 [72 N. Y. Supp. 449]; *Commonwealth v. Bradney, supra*; *Commonwealth v. Frey*, 11 Pa. Co. Ct. 523; *United States v. Cobban*, 127 Fed. Rep. 713; *United States v. Kilpatrick, supra*; *In re District Atty., supra*, "to advise as to the admissibility of evidence and the proper mode of procedure," (with citations), "to give general advice on questions of law," (with citations).

"But he cannot participate in the deliberations or express opinions on questions of fact, or as to the weight and sufficiency of evidence, or attempt in any way to influence the finding. While it seems to be very generally regarded as the better practice, and the grand jury has a right to require that the prosecuting attorney shall retire from the room during its deliberations, and in some jurisdictions his presence is expressly forbidden by statute, the mere fact that, with the consent of the grand jury, he is present while the jurors are deliberating or voting on a charge, will not constitute such an irregularity as * * * will invalidate an indictment."

Proffatt, Jury Trial:

Sec. 57. "The right of officers to be present with the grand jury, in the examination of witnesses, in conducting the proceedings, and in their deliberations, is in general admitted, though in some places it is denied or very much restricted. * * * Sir John Hawles, in his remarks on Colledge's trial, says: 'I know not how long the practice of admitting counsel to a grand jury hath been. I am sure it is a very unjustifiable and insufferable one. If the grand jury have a doubt in point of law, they ought to have recourse to the court and that publicly, and not privately; and not rely on the private opinion of counsel; who

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at least behave themselves as if they were the parties.' However this may be, the practice is well established here that the *district attorney, or prosecuting officer, has a right to manage the production of evidence to the grand jury and examine the witnesses, and this right extends to his clerk.*"

It will be seen that this last clause which limits the right of the prosecutor to the management of the production of evidence and the examination of witnesses, discredits the statement made by the author in the first part of this citation, that these officers have a right to be present with the grand jury during their deliberations.

Hirsh, Juries:

Sec. 718: "The statute of the state of New York gives the district attorney the right at all times to be present with the grand jury, and give them instructions and information relative to any matter cognizable by them; *except when they are expressing an opinion or taking a vote upon any matter before them, at which time neither district attorney, constable, or any other person is permitted to be present.* In some states, the district attorney or prosecuting officer may be present, even when they are discussing the propriety of finding an indictment, or when voting upon it; but he must not participate in either the finding or voting. The grand jury should not be controlled by their officer, but should act according to their own judgment and reason."

1 Chitty, Crim. Law:

Sec. 317: "It is not unusual, except in the King's Bench where the clerk of the grand juries attends them, to permit the prosecutor *to be present during the sittings of the grand jury to conduct the evidence on the part of the crown.* So on indictments for high treason where the sovereign himself is the party immediately injured, any of the King's counsel may attend for the same purpose on his behalf, as he cannot prosecute in person."

This citation from Chitty would seem to show clearly that at common law the only purpose for which the prosecutor could be present with the grand jury in any court was to conduct the evidence on the part of the crown, and in the King's Bench he was not permitted to be present even for that purpose—the clerk of the grand juries being the only one permitted to be present before the grand jury in that court.

Bishop, Crim. Proced.:

Sec. 861, Par. 4. "The authorities are not distinct as to the effect of this sort of persons," (others than the grand jurors), "during the deliberations on the finding of a bill; yet at least, in the words of Hanna, J., (*Shattuck v. State*, 11 Ind. [473], 477), "the better practice would be for the jury to exclude every other person from their room

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at such time; but we are not prepared to say that they may not, in their discretion, permit the prosecuting attorney to remain.

Par. 5. "The practice as to his," (the prosecuting officer's) "relations to the grand jury is not quite uniform. In most of our states he enters their room; *and when they are not deliberating on their finding, is with them helping in the examination of witnesses and advising on questions of law.*"

Sec. 862. "The common law procedure governs a grand jury constituted by a statute unless it otherwise provides."

This last citation incidentally throws some light upon the proper construction of the phrase, "*no other person*," as found in our statute, for we find above, the opinion that "*every other person should be excluded*," where, no doubt, the phrase last cited means every other person than the grand jury, and not every other person than the prosecutor.

Wharton, Crim. Law:

Sec. 495. "In New York, it seems to have been construed that the functions of the district attorney, so far as the grand jury are concerned, are exhausted at the moment of the bill reaching their hands, unless revived by a subsequent call for information, and that he has no right to be present at their sessions and assist in the examination of witnesses * * *. The practice in Massachusetts * * * is, for the officer having charge of the preparation of the indictments, to attend the grand jury—to open each particular case as it arises, to commence the examination of each witness—and to meet any question as to the law of the case which may be given to him, but it is his duty, 'during the discussion of the question, to remain perfectly silent, unless his advice or opinion in a matter of law is requested. The least attempt to influence the grand jury in their decision, upon the effect of the evidence, is an unjustifiable interference, and no fair and honorable officer will ever be guilty of it. It is very common, however, for some one of the grand jury to request the opinion of the public prosecutor, as to the propriety of finding the bill, but it is his duty to decline giving it, or even any intimation on the subject; but in all cases to leave the grand jury to decide independently for themselves.'"

Story, Constitution:

Sec. 1784. "They," (the grand jury), "sit in secret and examine the evidence laid before them by themselves."

STATUTES.

An examination of the statutes of the various states and territories shows a remarkable unanimity in the legislation on this subject, and throws a light upon the meaning of certain clauses contained in Sec.

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7195 of our statutes. That these statutes may be commented upon intelligently, I will cite below, these statutory provisions as far as I have been able after diligent search to find them.

Alabama, Code 1907, Sec. 7306:

"The solicitor must attend before the grand jury when required by them, and he may do so whenever he sees fit, for the purpose of examining witnesses in their presence, or giving them legal advice as to any matter connected with their duties, and he may appear before them at any time to give information as to any matter cognizable by them; *but he must not be present at the expression of their opinions or the giving of their votes on any matter before them.*"

Arkansas, digest 1904, Sec. 2211:

"No person except the prosecuting attorney and the witnesses under examination are permitted to be present while the grand jury are examining a charge, *and no person whatever, shall be present while the grand jury are deliberating or voting on a charge.*"

California, penal code 1901, Sec. 925:

"The grand jury may, at all times, ask advice of the court, or the judge thereof, or of the district attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The district attorney of the county may, at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever he thinks it necessary; the grand jury, on the demand of the district attorney, whenever criminal causes are being investigated before them, must appoint a competent stenographic reporter to be sworn, and report the testimony that may be given in such causes in shorthand, and reduce the same upon request of the district attorney, to longhand or typewriting; a copy of such testimony must be delivered to defendant upon his arraignment after indictment. The services of such stenographic reporter constitute a charge against the county. No person other than those specified in this and the succeeding section, is permitted to be present during the session of the grand jury, except the members and witnesses actually under examination, *and no person must be permitted to be present during the expression of their opinion or giving their votes upon any matter before them.* The grand jury or district attorney may require by subpoena the attendance of any person before the grand jury as interpreter, and such interpreter may, while his services are necessary, be present at the examination of witnesses before the grand jury."

Florida, 1906, Sec. 3856:

"Whenever required by the grand jury, it shall be the duty of the state attorney to *attend it for the purpose of examining witnesses in its*

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presence, or for giving it advice upon any legal matter, and to issue subpoenas and other process to secure witnesses."

Among the decisions cited herein is one construing this section.

Idaho, code 1901, Sec. 3511:

"The grand jury may, at all reasonable times, ask the advice of the court or the judge thereof, or of the prosecuting attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The prosecuting attorney of the county may, at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the session of the grand jury, except the members and witnesses actually under examination, and an interpreter when necessary, *and no person must be permitted to be present during the expression of their opinions or giving their votes upon any matter before them.*"

Indiana statutes of 1908, Sec. 1980:

"The prosecuting attorney or his deputy shall be allowed at all times to appear before the grand jury for the purpose of giving information relative to any matter cognizable by it, or advice upon any legal matter when required; and he may interrogate witnesses before the grand jury when the jury or he deem it necessary, *but no prosecuting attorney, officer or person shall be present with the grand jury during the expression of their opinions or in giving their votes upon any matter before them.*"

Indian Territory, code 1899:

Sec. 1434. "The grand jury may, at all reasonable times, ask the advice of the court or the prosecuting attorney."

Sec. 1435. "No person except the prosecuting attorney and the witness under examination, are permitted to be present while the grand jury are examining a charge, *and no person whatever, shall be present while the grand jury are deliberating or voting on a charge.*"

Iowa, code 1897, Sec. 5265:

"Such attorney, (prosecuting attorney), shall be allowed at all times, to appear before the grand jury, on his own request, for the purpose of giving information relative to any matter cognizable by it; *but neither he nor any other officer or person, except the grand jury, must be present when the question is taken upon finding of an indictment.*"

Kansas statutes of 1899, Sec. 5333:

"Such attorney, (prosecuting attorney), shall be allowed at all times, to appear before the grand jury on his request for the purpose of giving information relative to any matter cognizable by them, and may be permitted to interrogate witnesses before them when they or he

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shall deem it necessary; *but no such attorney or any other officer or person, except the grand jurors, shall be permitted to be present during the expression of their opinions or the giving of their votes on any matter before them.*"

Kentucky criminal code:

Sec. 107. "The grand jury may, at all reasonable times, ask the advice of the court, or the attorney for the commonwealth."

Sec. 108. "No person except the commonwealth's attorney and the witnesses under examination, is permitted to be present while the grand jury are examining a charge, *and no person, whatever, shall be present while the grand jury are deliberating or voting on a charge.*"

Michigan laws of 1897, Sec. 11890:

"The prosecuting attorney of the county or other prosecuting officer shall be allowed at all times to appear before the grand jury upon his request, for the purpose of giving information relative to any matter cognizable by them; *but no prosecuting officer, constable, or any other person except the grand jurors shall be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them.*"

Minnesota laws of 1905, Sec. 5285:

"The grand jury may at all reasonable times ask the advice of the court or of the county attorney, and whenever required by the grand jury the county attorney shall attend them for the purpose of framing indictments or examining witnesses in their presence, *but no county attorney, sheriff, or other person except the grand jurors, shall be permitted to be present during the expression of their views or the giving of their votes on any matter before them.*"

Mississippi code 1906, Sec. 1663:

"The district attorney shall attend the deliberations of the grand jury *whenever he may be required by the grand jury, shall give the necessary information as to the law governing each case in order that the same may be presented in the manner required by law.*"

Vol. 1, Missouri statutes of 1899:

Sec. 2496. "Whenever required by any grand jury, it shall be the duty of the prosecuting attorney in the county to attend them for the purpose of examining witnesses in their presence or giving them advice upon any legal matter."

Sec. 2497. "Such attorney shall be allowed at all times to appear before the grand jury on his request, for the purpose of giving information relative to any matter cognizable by them, and may be permitted to interrogate witnesses when they or he shall deem it necessary; *but no such attorney or any other officer or person, except the grand jurors,*

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shall be permitted to be present during the expression of their opinions or the giving of their votes on any matter before them."

Montana, code 1895, Sec. 1788:

"The grand jury may, at all reasonable times, ask the advice of the court or of the judge thereof, or of the county attorney; but unless such advice is asked, the judge of the court must not be present during the session of the grand jury. The county attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the sessions of the grand jury except members and witnesses actually under examination, *and no person must be permitted to be present during the expression of their opinions or giving their votes on any matter before them."*

Nebraska statutes of 1903, Sec. 2533:

"The prosecuting attorney or the assistant prosecuting attorney, shall be allowed at all times to appear before the grand jury for the purpose of giving information relative to any matter cognizable by them, or giving them advice upon any legal matter they may require, and he may interrogate witnesses before them when they or he shall deem it necessary, *but no other person shall be permitted to remain in the room with said jury while they are expressing their views or giving their votes on any matter before them."*

Nevada, 1900, Sec. 4178:

"The grand jury may, at all reasonable times, ask the advice of the court or any member thereof, and of the district attorney. Unless his advice be asked, no member of the court shall be permitted to be present during the session of the grand jury. The district attorney shall be allowed at all times to appear before the grand jury on his request, for the purpose of giving information or advice relative to any matter cognizable by them; and may interrogate witnesses before them when they shall deem it necessary. Except the district attorney, no person shall be permitted to be present before the grand jury besides the witness actually under examination, *and no person shall be permitted to be present during the expression of their opinions or the giving of their votes on any matter before them."*

New Mexico laws of 1897, Sec. 986:

"The grand jury may at all reasonable times, ask the advice of the court, the attorney general or the district attorney of the county, and whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of framing indictments or of examining witnesses in their presence, *but no district*

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attorney, sheriff, or other persons shall be permitted to be present during the expression of opinions or giving of their votes upon any matter before them."

New York, Parker's criminal code, 1906:

Sec. 262. "The grand jury may, in any case, ask the advice of any judge of the court or of the district attorney of the county."

Sec. 263. "Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them, for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and of issuing subpoenas or other process for witnesses."

Sec. 264. "The district attorney of the county and assistant district attorney, or in counties having no district attorney, an attorney appointed by a justice of the Supreme Court, upon nomination of the district attorney to attend upon the grand jury, must be allowed at all times to appear before the grand jury at his request for the purpose of giving information relative to any matter before them, *but no district attorney, officer or other person shall be present with the grand jury during the expression of their opinions or the giving of their votes upon any matter."*

North Dakota, 1905, Sec. 9829:

"The grand jury may, at all reasonable times, ask the advice of the court or of the state attorney. The state's attorney may at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them and may interrogate witnesses before them whenever he thinks it necessary; but no other person is permitted to be present during their session except the members and a witness actually under examination, *and no person whomsoever, must be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them."*

Oklahoma, 1893, Sec. 1714:

"*Whenever required by the grand jury, it shall be the duty of the county attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice in any legal matter, or issue subpoenas and other process to enforce the attendance of witnesses, and to draw up bills of indictments when found by the grand jury."*

Oregon laws of 1887, Sec. 1255:

"The district attorney when required by the grand jury, must prepare indictments or presentments for them and attend their sittings to advise them in relation to their duties, or to examine witnesses in their presence; but no person other than the district attorney or a wit-

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ness actually under examination, can be allowed to be present during the sittings of *the grand jury, nor either such attorney or witness when the grand jury are deliberating or voting upon a matter before them.*"

South Dakota, code 1891, Sec. 8481:

"The grand jury may, at all reasonable times, ask advice of the court or of the district attorney. The district attorney may, at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and may interrogate witnesses before them whenever he thinks it necessary; but no other person is permitted to be present during their sessions except the members and a witness actually under examination, *and no person whomsoever must be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them.*"

Tennessee, code 1896, Sec. 7041:

"Whenever required by the grand jury, the prosecuting attorney may attend before it for the purpose of giving legal advice as to any matters cognizable by them, *but shall not be present, nor shall any other officer or person when the question is taken upon the finding of an indictment.*"

Utah, code 1907, Sec. 4720:

"The grand jury may, at all reasonable times, ask the advice of the court or the judge thereof, or of the district attorney, but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The district attorneys or attorneys for the state may, at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he shall think it necessary, but no other person shall be permitted to be present during the sessions of the grand jury, except the members, interpreters and witnesses actually under examination, *and no person must be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them.*"

Virginia, code 1904, Sec. 3988:

"* * * It shall be unlawful for any attorney for the commonwealth to go before any grand jury during their deliberations, except when duly sworn to testify as a witness, but he may advise the foreman of the grand jury, or any member or members thereof in relation to the discharge of their duties."

Washington, code 1897, Sec. 6812:

"The prosecuting attorney shall attend on the grand jury for

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the purpose of examining witnesses and giving them such advice as they may ask."

Wisconsin statutes of 1898, Sec. 2551:

"Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter and to issue subpoenas and other process to bring up witnesses."

Wyoming statutes 1899, Sec. 5285:

"The prosecuting attorney or assistant prosecuting attorney, shall be at all times allowed to appear before the grand jury, for the purpose of giving information relative to any matter cognizable by them, or giving them advice upon any legal matter when they may require it; and he may be permitted to interrogate witnesses before them when they or he shall deem it necessary; but no such attorney or any other person shall be permitted to be present during the expression of their views or the giving of their votes on any matter before them."

Maine 1903, Sec. 6, page 969:

"The attorney general, county attorney, or foreman of the grand jury, shall swear or affirm, in presence of the jury, all witnesses who are to testify before them."

Georgia code 1882, Sec. 377:

Clause 2. *"(Duties of the solicitor general) To attend on the grand juries, advise them in relation to matters of law, and swear and examine witnesses before them."*

Texas criminal code 1888, Art. 394, 395, page 105:

Art. 394. *"The attorney representing the state may go before the grand jury at any time except when they are discussing the propriety of finding a bill of indictment, or voting upon the same."*

Art. 395. *"The attorney representing the state may examine the witnesses before the grand jury, and may advise as to the proper mode of interrogating them, if desired, or if he thinks it necessary."*

The only state whose statute on this subject differs from those cited above, is Arizona.

Arizona: (Sec. 1416.) *"The grand jury may at all reasonable times, ask the advice of the court, of the judge thereof, or of the district attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The district attorney may, at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary, but no other person is permitted to be present*

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during the sessions of the grand jury, except the members and witness actually under examination, or an interpreter; *and no person must be permitted to be present during the expression of their opinions or giving their votes upon any matter before them, except the district attorney.*"

Before proceeding to consider and discuss the constitutional and statutory provisions of our own state on this subject, I think it may conduce to a readier understanding of what the Ohio law is, to insert at this place the decisions so far as I have been able to find them in the limited time at my disposal, which have been given by the highest authorities in other states and opinions of approved text writers upon the various statutes cited above.

Miller v. State, 42 Fla. 266, 272 [28 So. Rep. 208], (already cited earlier in this decision) :

"At common law the prosecuting officer, or an individual prosecutor, might appear in the secret session of the grand jury, *and conduct the evidence on the part of the crown*; but it does not appear that it was the practice for even the prosecuting officer to be present when the vote on the bill is taken. Authorities in this country incline to the view that the prosecuting attorney and his assistant may be present during the examination of witnesses, and give legal advice upon points of law, *but should retire when the vote is taken, or, if present, should remain silent as to how the jury should vote on the indictment.*"

State v. Baker, 33 W. Va. 319, 321 [10 S. E. Rep. 639] :

"Will the presence of the prosecuting attorney before a grand jury vitiate an indictment? Our code of 1868 (chapter 120, Sec. 5) provided that, 'It shall be the duty of every prosecuting attorney in this state to go before the grand jury whenever, in his opinion, the public interest will be promoted thereby, or when called upon by the foreman to do so, to aid them with his advice and assistance in the discharge of their official duties. *But he shall not be present when any vote is taken upon the finding of an indictment or presentment.*'"

"*This statute has been repealed*, and for that reason it is claimed the legislature did not intend prosecuting attorneys to go before grand juries. In the *first* place, this section made it the duty of the prosecuting attorneys to do so, whereas before it was not imperative; and, *secondly*, though the legislature may have so intended, it could only express its intent by enactment. This repeal left the subject as it was at common law. How is it at common law?"

The court then cites a number of authorities to sustain the right of the prosecuting attorney to be present for the purpose of examining witnesses and giving advice, but expressly excepts in a number of the

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above authorities, the right to be present during the deliberations and vote.

Commonwealth v. Bradney, 126 Pa. St. 199, 205 [17 Atl. Rep. 600].

"The district attorney is the attendant of the grand jury; it is his duty as well as his privilege to lay before them matters upon which they are to pass, to aid them in their examination of witnesses, and to give them such general instruction as they may require. But it is his duty during the discussion of a particular case, and whilst the jurors are deliberating upon it, to remain silent. It is for the jury alone to consider the evidence and to apply it to the case in hand; an attempt on the part of the district attorney to influence their action or to give effect to the evidence adduced, is in the highest degree improper and impertinent. *Indeed, it is the better practice, and the jurors have an undoubted right to require, that he should retire from the room during their deliberations upon the evidence and when the vote is taken whether or not an indictment shall be found or a presentment made.*"

Blevins v. State, 68 Ala. 92, 94:

"It is the policy of the law that the preliminary inquiry as to the guilt or innocence of persons charged with offense against the criminal law, should be conducted in secrecy. It is in pursuit of this policy that the jurors are each sworn, 'the state's counsel, your fellows and your own you shall keep secret.' Many are the reasons for this secrecy, so variant from the publicity which must generally attend judicial proceedings. One is, that if the proceedings were public, parties charged before the jury would be informed and afforded an opportunity to escape before the deliberations of the jury were completed and process for their arrest could be issued. Another reason is that there shall be the largest freedom of discussion and deliberation by the jury, which could not well be secured if the proceedings were not secret, and all disclosure of the counsels of the jury prohibited. It is the protection of the jury in the freedom of discussion and deliberation the statute contemplates in excluding the presence of the solicitor, though a sworn public officer, while they are giving expression to their opinions or casting their votes."

Shattuck v. State, 11 Ind. 473 (Decided 1858; since set aside by statute of 1908, Sec. 1980):

Syl. 4. "That the better practice would be for the grand jury to permit no person to be present when they vote upon an indictment; but, it seems, they may permit the prosecuting attorney to be present."

The statute of 1908, hereinbefore set out, prohibits the prosecutor from being present during the deliberations and vote of the grand jury.

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Regent v. People, 96 Ill. App. 190:

Syl. 6. "There is in this state no statute forbidding the presence of the state's attorney before the grand jury when an indictment is found, and such presence is permissible under the common law."

If by the last named decision is meant that the prosecuting attorney is permitted to examine witnesses and present evidence, the reference to the common law is correct, but if it is also intended to include the right of the prosecuting attorney at common law to be present during the deliberations and vote of the grand jury, the authorities heretofore cited upon this point, are to the contrary. It will be noticed that the last citation is from the appellate court of Illinois, while the next case which I shall cite was decided by the Supreme Court of that state and still stands unreversed or modified.

Gitchell v. People, 146 Ill. 175 [33 N. E. Rep. 757; 37 Am. St. Rep. 147]:

Syl. 5. "The prosecuting attorney may be present with the grand jury to give advice, to interrogate witnesses, to draw such bills as the jurors are prepared to find, and to give such general instructions as they may require; but he is not to influence or direct them in respect to their findings, *nor ought he to be present when they are deliberating upon the evidence, or when their vote is taken.*"

In this connection I wish to call attention to the fact that there is no statutory provision in Illinois, and that this expression of its highest court is a strong and authoritative statement of the common law upon the subject.

United States v. Wells, 163 Fed. Rep. 313:

Syl. 5. "The district attorney has no right to participate in nor to be present during the deliberations of a grand jury, nor to express opinions on questions of fact, or as to the weight and sufficiency of the evidence."

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"At the common law the prosecutor had no right to attend the sessions. It is even doubtful whether he had a right, unsolicited, to send indictments to the inquisitorial body for consideration. * * * It is a familiar historical fact that the system was devised to prevent harassments growing out of malicious, unfounded, or vexatious accusations."

Charge to Grand Jury, 2 Sawy. 667 [30 Fed. Cas. 992]:

Syl. 7. "The district attorney has a right to be present before the federal grand jury at the taking of testimony, for the purpose of giving information or advice, and may interrogate the witnesses; *but he has no right to be present during the deliberations of the grand jury.*"

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"When your vote is taken upon a question whether an indictment shall be found or a presentment made, *no person besides yourselves should be present.*"

United States v. Wells, 163 Fed. Rep. 313, 326, citing the Idaho statute, "The prosecuting attorney of the county may *at all times*," etc., the court said, page 327:

"Giving the doctrine that the state statutes relating to practice prevail in the federal courts the greatest latitude, and this section, considering the grand jury system as administered by them its widest meaning, it must be held, in the absence of state construction, that the provision that the prosecuting attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, *was meant to confine him to those traditional duties of giving advice concerning procedure and the like, to the examination of witnesses, as expressly provided, and not to the expression of opinions or the making of arguments.*"

In Connecticut as far back as 1816, we find the court giving the following directions to the grand jury (*Lung's Case*, 1 Conn. 428):

"You will retire to some convenient apartment to be provided for you by the sheriff. You will choose some one of your number to be your foreman. The attorney for the state will lay before you such bills as he may think proper and refer you to the witnesses to support them. You will cause the prisoner and the witness to come before you. *You will admit no counsel on the part of the state or of the prisoner.* You will permit the prisoner to put any proper question to the witnesses, but not to call any witnesses on his part. *You will admit no spectators to be present during your enquiries and deliberations.*"

It will be seen by an examination of the above citations of statutes that the following states expressly prohibit the prosecutor from being present during the sessions of the grand jury while they are deliberating and casting their votes, namely: Alabama (1907), Arkansas (1904), California (1901), Idaho (1901), Indiana (1908), Indian Territory (1899), Iowa (1897), Kansas (1899), Kentucky (1903), Michigan (1897), Minnesota (1905), Missouri (1899), Montana (1895), Nevada (1900), New Mexico (1897), New York (1906), North Dakota (1905), Oregon (1887), South Dakota (1891), Tennessee (1896), Texas (1888), Utah (1907), Virginia (1904), Wyoming (1899), being twenty-four in all, and if to those we add Nebraska and Ohio we should have twenty-six states, all of which have practically the same statute of prohibition as to the prosecutor's presence, and it will be noticed that these statutes are those of states having codes in other respects very similar to Ohio.

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The following states have no provision whatever, upon the subject and may, therefore, be construed as controlled by the common law, which as we have seen from the citations of text writers, did not permit the prosecutor to be present while the jurors were deliberating and giving their votes, namely: Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maine, Massachusetts, New Hampshire, New Jersey, North Carolina, Vermont, Rhode Island, West Virginia, but even in these states we have seen that four of them, namely: West Virginia *State v. Baker*, 33 W. Va. 319, 321 [10 S. E. Rep. 639]; Illinois (*Gitchell v. People, supra*); Florida (*Miller v. State, supra*) and Connecticut (*Lung's Case, supra*), have decided in the absence of any express statute on the subject, that the prosecutor should not be present during the deliberations of the grand jury. Omitting these four states, there will just be eleven which have no provision in regard to the presence of the prosecutor at any time before the grand jury.

There are then four other states, Mississippi, Oklahoma, Wisconsin and Maryland, which so far as I have been able to discover, have some provisions in relation to the duties of the prosecutor before the grand jury, but neither permit nor prohibit his presence, and which may, therefore, be assumed to follow the common law in this regard.

There is but a single one of the states which in direct language authorizes his presence during the deliberations and voting, and that state is Arizona. This statement shows conclusively the great preponderating opinion of the legislators in the different states that the grand jury should be alone, at least, during its deliberations and voting.

When we stop to consider that the conditions in these states are practically the same as in our own, that the same language is spoken, the same fundamental principles underlie their local government, the same reasons exist for the protection of the lives and liberties of their citizens by the use of all proper safeguards; that the codes of these states are copied after those of others and tend to uniformity upon all the great and important subjects of legislation, we cannot but feel that the same influences through which these restrictions were placed upon the statutes of the states in the first group which I have named, must have had weight in the legislation upon the same subject in this state, and that Ohio and Nebraska, two of the most enlightened and progressive states in the country, would most likely line up with the great majority of all the states in the Union, rather than to stand alone with Arizona, the only state which permits the prosecutor's presence.

Article 8, Sec. 10, Ohio Const., 1802:

"That no person * * * shall be * * * put to answer any criminal charge but by presentment, indictment or impeachment."

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Article 1, Sec. 10, Ohio Const., 1851:

"Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury."

The grand jury system as shown by the above citations from the two Ohio constitutions, has been recognized and in force during the entire existence of the state, and legislation thereupon dates back to the very first volume of Ohio laws under the constitution of 1802.

In the absence of express legislation upon the subject, the common law procedure as to the right of the prosecuting officer to be present with the grand jury during its session, was fully recognized and in force, and as we have seen from the text writers, no authority was given in common law, to the prosecutor to attend its sessions, except perhaps, for the purpose of examining witnesses and giving the grand jury legal advice upon matters cognizable by the grand jury, when requested by it to do so.

The first act upon this subject was the following: 66 O. L. 298 (Sec. 7195 Rev. Stat.), passed May 6, 1869:

Sec. 73. "The prosecuting attorney or the assistant prosecuting attorney shall be allowed at all times to appear before the grand jury, for the purpose of giving information relative to any matter cognizable by them, or giving them advice upon any legal matter when they may require it, and he may be permitted to interrogate witnesses before them when they or he shall deem it necessary; but no such attorney, nor any other person, shall be permitted to be present during the expression of their views, or the giving of their votes on any matter before them."

As neither the prosecutor nor any other person, under the common law, had such right referred to in the last clause of this section, this clause may properly be construed as merely declaratory of the common law as it existed at the time the act was passed.

The next legislation upon the subject was the following: 69 O. L. 3, passed February 1, 1872:

Sec. 73. "The prosecuting attorney, or the assistant prosecuting attorney, shall be allowed at all times to appear before the grand jury, for the purpose of giving information relative to any matter cognizable by them, or giving them advice upon any legal matter they may require, and he may interrogate witnesses before them, when they, or he, shall deem it necessary; but no other person shall be permitted to remain in the room with said jury, while they are expressing their views, or giving their votes on any matter before them."

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It will be seen that this last act amends that of May 6, 1869, in several particulars as follows:

66 O. L. 298 (May 6, 1869):

"Giving them advice upon any legal matter when they may require it."

"and he may *be permitted* to interrogate witnesses."

"but no such attorney, nor any other person, shall be permitted to be present during the expression of their views," etc.

69 O. L. 3 (Feb. 1, 1872):

"Giving them advice upon any legal matter they may require."

"and he may interrogate witnesses."

"but no other person shall be permitted to remain in the room with said jury while they are expressing their views," etc.

A comparison of these will show that the real object of amending the 66 O. L. 298, passed May 6, 1869, was to give the prosecutor an absolute right, independent of the grand jury, to be present for the purpose of examining witnesses and presenting matters for their consideration, instead of merely being permitted to do so at the pleasure of the grand jury.

Thus the language in the earlier act is "*he may be permitted to interrogate witnesses, etc.*;" in the later "*He may interrogate witnesses, etc.*"

Under the former he would first have had to get the *permission of the grand jury*, to interrogate witnesses, etc.; under the latter he had that right without needing such permission.

In the earlier act he might give them advice upon any matter only "*when they may require it*;" under the later he might give them advice upon any legal matter "*they may require*;" and he, as well as they, had the right to determine when they required such legal advice and could give it when he might think it necessary without waiting for them to require it of him.

These two amendments made our statute conform to the laws generally upon the same subject in other states and were sufficient to warrant the amendment of the earlier act.

As to the effect of the amendment which dropped the words "*no such attorney*," in the last clause, if we are right in the view we take of the common law, these words were mere surplusage and were merely declaratory of the common law. The clause would have been equally as effective for this purpose if these words had been omitted in the act of 1869, (as was the case in the act of 1872), as the undoubted intention of the former act was to have no other person in the grand jury room with the grand jury while they were expressing their views or giving their votes.

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The dropping of these superfluous words still left the act declaratory of the common law and should be so construed, unless the language of the amended act clearly imported an intention to change the common law.

State v. Fronizer, 77 Ohio St. 7, 16 [82 N. E. Rep. 518]:

"It is an equally well established rule that the general assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly imports such intention."

Felix v. Griffiths, 56 Ohio St. 39 [45 N. E. Rep. 1092]:

Syl. 2. "In giving construction to a provision of a statute, or a contract, which attempts to abrogate, or modify, a well established rule of the common law, the scope of the provision should not be extended beyond the plain import of the words used if reasonable effect can otherwise be given to it."

Orlopp v. Schueller, 72 Ohio St. 41, 59 [73 N. E. Rep. 1012; 106 Am. St. Rep. 583]:

"When we consider, then, that to give section 5531 the force and effect claimed for it * * * is to abrogate a well and firmly established rule of law, presumably known to the legislature at the time of the enactment of said section, we think we may well conclude that if the legislature had intended thereby * * * it would not have left its purpose and intention in that behalf to *implication*, or to be discovered only through the medium of *judicial interpretation*."

Swazey v. Blackman, 8 Ohio 5, 20.

"If every alteration in the law were to authorize new views and new rules, there never would be any certainty. It is very common in framing new statutes to omit clauses which were contained in antecedent ones, merely because they were unnecessary and superfluous."

Hamilton v. State, 78 Ohio St. 76, 83 [84 N. E. Rep. 601]:

"It is a well settled rule of statutory construction that in the amendment or revision of statutes, that the mere change of phraseology, or the mere omission of words which are deemed redundant, does not indicate a legislative intent to change the pre-existing law."

If, therefore, the clause, left after dropping from the act of 1869 the words "no such attorney," leaves language complete in itself to express the legislative intent, and especially, if the present act is strictly in conformity to the common law and analogous to the statutes of over one-half the other states, is it not a conclusion, almost, if not quite final, that the legislature in passing the act of 1872 intended this clause to have a similar construction? Now, does the clause, taken by itself, have that certainty of meaning necessary to establish a legislative intent? It reads as follows:

"No other person shall be permitted to remain in the jury room

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with said jury while they are expressing their views or giving their votes on any matter before them."

Is not this clause clear in its meaning that the "no other person," has reference to *no other person than the grand jury*?

But it may be claimed that, as the preceding clauses in this section relate to certain privileges given to the prosecutor, the phrase "no other person" must refer to him and not to the grand jury. An examination of the clause before the one under discussion shows that the prosecutor may examine *witnesses* before the grand jury. At the time of such examination there would necessarily be present the grand jury, the prosecutor and the witnesses. If we are asked to draw an inference from the disputed clause that the *prosecutor* may be present during the deliberations and voting of the grand jury, why is it not equally as logical and grammatical to infer that this disputed clause permits the *witnesses* also to be present?

If we must look to an antecedent part of the section to determine who the "no other person" refers to, why not make it applicable to the *witnesses* as well as the *prosecutor* who are both mentioned in the preceding clause, so that the section would be construed as if it read "No other person than the *prosecuting attorney* or *witnesses* shall be permitted to remain, etc."

This would be just as logical as to say that it refers to the prosecutor alone. And yet such a rendition of the meaning of the clause would be manifestly untenable and absurd. From a logical point of view, the only rational construction that can be given to the language used, even from merely grammatical considerations, is that it means "no other person than the grand jury."

But apart from this reason, we find evidence that is most convincing in other provisions of the same chapter. Sections 7191 and 7192 prescribe the oath taken by the foreman and the grand jury.

Sec. 7191. "The counsel of the state, your own and your fellows, *you shall keep secret*, unless called on in a court of justice to make disclosures."

So much stress is laid upon this obligation of *secrecy* in the oath that Sec. 7193 Rev. Stat. requires that they shall be charged by the court, "who shall call their attention *particularly* to the obligation of *secrecy* which their oaths impose. * * *"

The stenographer who takes the testimony under Sec. 7195 Rev. Stat. "shall take an oath to be administered by the court after the grand jurors are sworn, imposing an obligation of *secrecy* * * *."

Section 7205 provides that,

"No grand juror shall be allowed to state or testify in any court in what manner he or other members of the grand jury voted on any

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question before them, or what opinion was expressed by any juror in relation to such question."

Comparing Sec. 7191 with Sec. 7205, it will be seen that, although he may make disclosures in a court of law as to some of the things which transpired in the grand jury room, so much sanctity is given to their deliberations and voting that even in a court of law they shall not be compelled nor even permitted to make disclosures concerning them.

Yet it is claimed the prosecuting attorney and his assistants, who are bound by no special oath or obligation in this respect, may be present, hear their discussions and become aware as to how each member voted. Why all this secrecy which hedges in the grand jury at every stage of their proceedings if the prosecutor and any or all of his assistants may have this exceptional privilege?

But it may be urged that the prosecutor is sufficiently bound by his general oath of office and that he needs no additional or special obligation of secrecy. So is a judge bound by his official oath and a bailiff by his, and yet neither a judge nor bailiff would be permitted to claim the right to be present at any time during the sessions of the grand jury.

But it may be said that the statute expressly permits the prosecutor, but not the judge or bailiff, to attend their sessions and that it is by reason of the statute that the prosecutor claims this right. This would be a sufficient argument if the statute actually gave him affirmatively any such right. It does give him such affirmative right as to the first part. This is the language:

"The prosecuting attorney, or assistant prosecuting attorney *shall be allowed* * * * and *he may interrogate* witnesses * * *."

These are specific grants of authority. But the right to be present during the deliberations and voting of the jury can be claimed, if at all, by mere inference or implication only. Nowhere, either in this chapter or in other statutes relating to the duties, authority and privileges of the prosecuting attorney is there any direct or affirmative privilege of the kind referred to set out.

Can it be that the legislature, after enjoining so strongly the obligation of secrecy upon the jurors themselves, intended, by mere implication or inference, to permit the prosecutor to be present when by the addition of three words, "than the prosecutor," after the word "person" they could have made such intent clear and affirmative? Especially is such a supposition untenable when we reflect that the legislature, theoretically at least, were aware of stringent provisions in the statutes of other states which expressly prohibited the presence of the prosecutor at such time.

Let us stop to think how it is in civil cases in which the county

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or state is a party and for which the prosecutor appears before the petit jury as its attorney. He prepares the pleadings, issues process for witnesses, examines them in court, presents his evidence and makes his argument on behalf of his client; but when the trial jury closes its door and retires for consultation, no prosecutor, assistant or any other person, is permitted to be present with the jury while they deliberate and vote.

If such precautions are taken to protect the rights of parties to a civil suit, involving only a question of dollars and cents, shall we say that the criminal law, whose whole theory is based on the principle of protecting the rights of the accused and the presumption of his innocence until proven guilty beyond a reasonable doubt, shall be less particular in seeing that no improper influence shall affect the minds of the grand jurors, who are called upon to pass on not merely monetary damages but upon charges affecting the lives, the liberties and the good names of their fellow beings?

It is conceded by the authorities without exception that even if the prosecutor, by inadvertence or ignorance of the law, should remain in the room with the grand jury during their deliberations and voting, he should not be permitted to use any influence or to offer any suggestion as to their finding or not finding an indictment. But if that is the case, why permit him there at all? Why the vain thing of allowing his presence and at the same time preventing his talking or taking any other part with the jury?

United States v. Kilpatrick, 16 Fed. Rep. 765, 770.

"Their findings must be their own, uninfluenced by the promptings or suggestions of others, or *the opportunity thereof*."

That the theory that the dropping of the words "no such attorney" as merely surplusage is correct is sustained, possibly only to a slight extent, but worthy of some reference, by the changes in the revision of the same act in 74 O. L. 330, Sec. 7, which amended 69 O. L. 3, by dropping out, on line 4, the superfluous words "giving them" before the word "advice;" changing the words "they may require" into "when required" on line 5; substituting the word "jury" instead of "them," "it" instead of "they" and "deems" instead of "deem" on line 6; and substituting "the jury" instead of "said jury" and "jurors" instead of "they" in line 8.

These changes are entirely grammatical and yet to make them the legislature took the trouble to amend the previous act, although such amendment made no change, apparently, in the meaning of the act but merely used more appropriate language to convey the same intent.

Why may not the same motive have been sufficient to account for the amendment made in the act of 1869 in dropping as superfluous the restriction on the prosecuting attorney's presence? But whether this

was one reason for the new act is of minor importance when we recall that other important changes were put into the amendment previously referred to, which changes would have of themselves been sufficient to warrant their amendment.

A casual inspection of the phrase "at all times," which occurs in line 2 of Sec. 7195 Rev. Stat., might give the impression that these words are to be construed in an unrestricted sense; but an examination of the other provisions of the statute shows that it is limited to the purposes named in the section, viz., "giving information relative to any matter cognizable by it, or advise upon any legal matters when required" and to "interrogate witnesses before the jury when it or he deemed it necessary."

This expression "at all times" is found in practically every one of the statutes of the other states which I have heretofore cited and, with one or two exceptions, is followed by the same restriction upon the prosecutor's presence during the deliberation or voting of the jury that we find in Sec. 7195 Rev. Stat.; showing that the words are to be taken in their limited sense and only with reference to the purposes set out, so that when the phrase "at all times" is used it means at all times except while they are deliberating or casting their votes. This is expressly stated in the last public opinion of any federal court upon this subject, viz., *United States v. Wells*, 163 Fed. Rep. 313, 327:

"It must be held, in the absence of state construction, that the provision that the prosecuting attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, was meant to confine him to those traditional duties of giving advice concerning procedure and the like, to the examination of witnesses, as expressly provided, and not to the expression of opinions or the making of arguments."

That this is the meaning of the phrase there can be no doubt, for surely if a clause in one section of an act permits the presence of the prosecutor at all times and another one prohibits his presence during some of the time, it can only mean that the phrase is limited to those times for which the purposes are set forth.

Mt. Vernon v. Mochwart, 75 Ohio St. 529, 536 [80 N. E. Rep. 185]:

"The fundamental inquiry in all judicial construction being to ascertain the intention of the legislature and the object to be attained by the particular enactment, these considerations will control the literal interpretation of the language used in the act itself. And where the meaning of a statute is doubtful, the construction most agreeable to reason and justice should be adopted as the one most probably embodying the intention of the law makers."

Stevenson v. State, 70 Ohio St. 11 [70 N. E. Rep. 510].

This was a criminal case involving the question as to the effect of

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an amendment concerning challenges for cause, the words "for cause" being in the original statute, but omitted in the amended one; the court said, page 15:

"As originally passed, May 6, 1869 (66 O. L. 307), this provision read as follows:

"The same challenges for cause shall be allowed in criminal prosecutions that are allowed to parties in civil cases.' By subsequent revisions of the section, of which this paragraph was a part, the phraseology of the section has been changed and the words 'for cause' have been omitted from this paragraph, yet the change so made is not such as to evidence any design or purpose on the part of the legislature to thereby extend its provisions or to make them apply to causes of challenge other and different from those specified in the paragraph as originally enacted, and the rule is well established by the repeated adjudications of this court that 'in the revision of statutes neither an alteration in phraseology nor the omission or addition of words in the latter statute, shall be held necessarily to alter the construction of the former act. And the court is only warranted in holding the construction of a statute, when revised, to be changed, when the intent of the legislature to make such change is clear, or the language used in the new act, plainly requires such change of construction.' "

It is not a question as to whether any particular prosecutor would attempt to persuade or influence a grand jury improperly; it is whether *any* prosecutor might do so. Nor is it entirely a question as to whether his influence may be exerted by words or acts. His mere presence has its influence and the ordinary juror would be more or less controlled by such presence, and, in the language of the court in *Miller v. State*, *supra*, "the unbiased judgment of the jury on the merits of a case would be invaded."

United States v. Wells, 163 Fed. Rep. 313, 326:

"At the common law the prosecuting officer had no right to attend the sessions of the grand jury at all, that it is only by virtue of statutes and modified procedure that he may now be present in the grand jury room."

I am informed by John E. Bruce, Esq., who, for eight years was assistant district attorney, that Judge Hammond, of the federal court, while acting in Judge Sage's place charged the grand jury that during their deliberations, and while voting, they must be absolutely alone and that the district attorney, although permitted to be present during the presentation of evidence and examination of witnesses must not remain in the room with the grand jury during their deliberations and voting.

Judge Albert Thompson, the present district judge, informs me

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that the charges to the grand jury which he has given have invariably contained the same instruction.

This view of the law by two such eminent authorities is entitled to great weight in construing the statute under consideration.

The conclusion which I reach, by the great weight of authorities, similar statutes of other states, the consensus of opinion of text-writers and the reason and spirit of the law, as well as the grammatical sense and meaning of the language used is, that while the prosecutor has the right at all times to appear before the grand jury for the purpose, first, of giving information relative to any matters cognizable by it; second, of advising it upon any legal matter when required; third, of interrogating witnesses before the jury when it or he deems it necessary, he has no right to remain in the room with the jury while the jurors are expressing their views or giving their votes on any matter before them.

In conclusion I feel that it would be proper to cite a further extract from the charge of Justice Field, *Charge to Grand Jury*, 2 Sawy. 667 [30 Fed. Cas. 992], which is recognized as a classic upon this subject.

Charge of Justice Field:

"The institution of the grand jury is of very ancient origin in the history of England; it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of commentators on the laws of that country, that it was at first a body, which not only accused, but which also tried public offenders. However this may have been in its origin, it was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown.

"In this country from the popular character of our institutions there has seldom been any contest between the government and the citizen, which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity. * * *"

State v. Stichtenoth.

Ex Parte Bain, 121 U. S. 1, 12 [7 Sup. Ct. Rep. 781; 30 L. Ed. 849]:

"It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, * * * 'individual citizens from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury; and in case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions.'

"It is never to be forgotten that in the construction of the language of the constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with a common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence.

"They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value."

To which may be added the following additional American authority upon constitutional law:

Story, Constitution, Sec. 1785:

"Grand juries perform most important public functions, and are a great security to the citizens against vindictive prosecutions either by the government, or by political partisans, or by private enemies."

The charge covering this point which I gave at the beginning of the April term was identical with that given by Judge O'Connell at the January term, which, at that time, seemed to attract no particular attention. See *Special Charge to Grand Jury*, 54 Bull. 252.

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GAS COMPANIES.

[Hamilton Common Pleas, February, 1909.]

NICHOLAS FECKTER v. UNION GAS & ELECTRIC CO.

RELATIVE PRICE OF GAS WHERE BOTH NATURAL AND ARTIFICIAL ARE FURNISHED BY THE SAME COMPANY.

A municipality, having by ordinance authorized a gas company to supply natural gas, and under certain conditions artificial gas and to charge a higher rate therefor; having by such ordinance constituted the board of public service the arbitrator or judge as to the existence of such conditions, and the said board having determined that conditions exist, which warrant the supplying of artificial gas at artificial gas rates, the gas company has authority to supply artificial gas to part of its patrons at artificial gas rates, until such time as the said board makes a different finding, or its original finding is set aside as not in good faith, or for other valid reasons.

[Syllabus approved by the court.]

A. H. Ewald, for plaintiff:

Cited and commented upon the following authorities. *Munn v. Illinois*, 94 U. S. 113 [24 L. Ed. 77]; *State v. Gas Light & C. Co.* 34 Ohio St. 572 [3 2Am. Rep. 390]; *Zanesville v. Gas-Light Co.* 47 Ohio St. 1 [23 N. E. Rep. 55]; *State v. Gas Trust Co.* 157 Ind. 345 [61 N. E. Rep. 674]; *Cincinnati, H. & D. Ry. v. Bowling Green*, 57 Ohio St. 336 [49 N. E. Rep. 121; 41 L. R. A. 422]; *Cooley*, Const. Lim. (7 ed.) 278; *Indiana Nat. & Illum. Gas Co. v. State*, 158 Ind. 516 [63 N. E. Rep. 220; 57 L. R. A. 761]; *American Water-Works Co. v. Nebraska*, 46 Neb. 194 [64 N. W. Rep. 711; 30 L. R. A. 447; 50 Am. St. Rep. 610].

Outcalt & Hickenlooper, for defendant.

HUNT, J.

This is an action brought by the owner and occupant of a house in the western part of the city to whom artificial gas has been and is being furnished by the Union Gas & Electric Co., a corporation organized for the purpose of supplying gas to the citizens of Cincinnati under a right so to do given by the city, to enjoin such company from cutting off such gas so long as payment for such gas is made or tendered at the rate of thirty cents per thousand feet.

The plaintiff alleges that the defendant has been and is now furnishing gas to its customers at such rate. The plaintiff does not state whether such gas so furnished is artificial or natural gas.

The defendant answers, admitting its corporate power and setting up what is known as the Conover contract, under which it says that until December 26, 1905, it was supplying artificial gas to consumers in Cincinnati; that there was in force at that time, and is now, an ordinance fixing the price of artificial gas at the net rate of seventy-

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five cents per thousand feet; that on said date the city of Cincinnati by ordinance authorized the defendant to supply natural gas to its consumers in the city, in and through its system of mains, etc., then in the streets of the city; that in said ordinance it was provided that "in the event said company should through no fault of its own, be unable to supply natural gas in sufficient quantities, because of the failure or deficiency of its own supply, or inability to purchase natural gas from other parties delivered to the company's mains at a contract price determined to be reasonable by the board of public service or its successors in authority, then the said company should furnish artificial gas to the city and its consumers therein at the rate and under the same conditions, regulations and limitations prescribed in the ordinance then in force, or which might thereafter be rightfully prescribed; that before said company should be permitted to charge in excess of the price fixed for natural gas, said company should first establish to the satisfaction of the board of public service or its successors in authority the facts: first, that it was unable through no fault of its own to supply natural gas by reason of the failure of its own supply; and secondly, that said company was unable to purchase natural gas delivered to its mains at a price determined to be reasonable by the board of public service or its successors in authority."

The defendant further says, that on said date, by ordinance, the city fixed the price of natural gas at the net rate of thirty cents per thousand feet; that thereafter, on May 9, 1908, the city of Cincinnati by its board of public service "considered and deliberated upon the ability of the said company to supply such natural gas for the entire city from its own source of supply, or purchase the same at the price determined by said board of public service to be reasonable; that after a full and public hearing and after due deliberation and consideration of said question, said board of public service found said company was, through no fault of its own, unable to supply natural gas to the entire city, or to purchase the same at the price determined to be reasonable, and did thereupon pass a resolution to this effect on the ninth day of May, 1908, approving the action of the defendant company in districting said city and supplying with natural gas the consumers in districts one and two only."

Defendant further says, that the plaintiff is not a consumer of natural gas, nor is the house and premises of the plaintiff within the operation or district of the city supplied with natural gas; that plaintiff is and was a consumer of artificial gas supplied by the defendant; that plaintiff at the time of the filing of this petition was indebted therefor to the defendant and that such indebtedness is increasing by reason of artificial gas furnished by the defendant, which indebtedness the plaintiff refused and still refuses to pay.

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The plaintiff demurs to such answer.

The plaintiff in the argument of his counsel, does not question the validity of the ordinance under which the defendant supplied artificial gas prior to December 29, 1905, or the validity of the ordinance of December 26, 1905, which authorized the defendant to supply natural gas, or the two ordinances fixing the price of artificial and natural gas supplied under such ordinances. Nor does the plaintiff in his petition or in his argument upon his demurrer, question in any way the good faith of the board of public service in its action of May 9, 1908; nor the finding of facts made on such day by said board.

Plaintiff in his argument desires it to be distinctly understood that he did not question the right of the company to supply consumers now furnished with natural gas at the net rate of thirty cents per thousand feet, but questioned only the right of the company to charge him more than thirty cents per thousand feet for the artificial gas furnished to him.

It is therefore unnecessary for the court to determine whether the demurrer raises any question as to the right of the defendant under its franchise to furnish natural gas to one part of the city and artificial gas to another part. In other words, whether the company had a right to furnish any natural gas to any part of the city until it furnished such gas to all its customers. Nor is it necessary to determine whether or not the plaintiff as a mere consumer of gas could raise such question. It is only necessary to determine in this case under the pleadings as construed by the plaintiff himself, whether the defendant is obligated to furnish artificial gas to plaintiff at thirty cents per thousand feet.

Under the ordinance of December 29, 1905, above mentioned, the defendant was authorized to supply natural gas and under certain conditions artificial gas, and under certain conditions was authorized to charge for artificial gas, artificial gas rates. By such ordinance the board of public service was constituted the arbitrator or judge as to the existence of such conditions. As the board of public service on May 9, 1908, determined the conditions to exist, under which the defendant company was authorized to supply artificial gas and charge therefor artificial gas rates until the board finds otherwise or until the finding of the board as to the existence of such conditions is set aside as not being made in good faith, or for any other valid reasons, the defendant company is authorized to supply artificial gas and charge therefor the rates fixed for artificial gas.

The plaintiff, therefore, in this case being a consumer of artificial gas, can be charged the rate fixed for artificial gas.

The demurrer of the plaintiff to the answer of the defendant is therefore overruled.

Distilling Co. v. Brown.

INJUNCTION—PURE FOOD LAWS.

[Hamilton Common Pleas, January, 1909.]

CLIFTON SPRINGS DISTILLING CO. v. MARK A. BROWN ET AL.

▲ THREATENED PROSECUTION OF MILK DEALERS TO PREVENT SALE OF MILK OF COWS TO WHICH DISTILLERY WASTE IS SOLD NOT ENJOINABLE.

▲ threatened prosecution by health officers and milk inspectors to prevent the marketing of milk from cows to which distillery waste has been fed, is not an interference with property rights of the manufacturers thereof against which injunction will lie.

[Syllabus approved by the court.]

Lawrence Maxwell, Jr., for plaintiff.

A. H. Morrill, for defendant.

HUNT, J.

The plaintiff, in its petition, alleges that it is operating a large distillery; that one of its products, after the separation of distilled spirits, is grain juice of which it has a daily output of about 2,500 barrels; that such product is a nutritious and healthful food for cattle, free from any injurious ingredients; that it is impractical to store such products, and that it has a large and profitable trade in the sale of this product to customers who haul it away in wagons.

Plaintiff further alleges that the defendants, the health officer of Cincinnati, and milk inspectors in his employ, have entered into a conspiracy to injure and destroy plaintiff's trade in grain juice, and in pursuance thereof are soliciting plaintiff's customers not to buy such juice, telling them that it is unlawful to use it, threatening them with criminal prosecution if they buy or use it; that defendants station themselves in the public highway near plaintiff's distillery, and as health officers of the city of Cincinnati stop intending purchasers of said juice, and by means of threats cause customers of plaintiff not to buy. Plaintiff says that unless defendants are enjoined from said acts its said business will be destroyed; that defendants are financially irresponsible, and that it will suffer irreparable injury for which it has no adequate remedy at law.

After the filing of this petition a temporary restraining order was issued, restraining the defendants "from soliciting the plaintiff's customers or others not to buy grain juice from it, and from threatening them with arrest or prosecution or other injury if they do so, and from picketing plaintiff's premises, and from interfering in any manner with plaintiff's said business, and from causing any of said acts to be done."

No answer has been filed by the defendants, nor has the time for answer arrived.

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The defendants promptly filed a motion to dissolve the restraining order.

Upon the hearing of this motion, the evidence does not establish all the facts alleged in plaintiff's petition, but does establish that plaintiff's product, which it calls grain juice and which is technically known as distiller's spent beer, is what is commonly known as slop or wet distillery waste, from which most of the solid matter has been filtered; that it contains about 3 per cent of nutritious, healthful and noninjurious substances mostly in solution, and about 97 per cent of sterilized water, and that when mixed with the proper amount of chopped hay or other similar roughage, the mixture, if fed under proper conditions and in proper amounts, is in quantity and quality a practical, scientific and proper food for milch cows. The evidence further shows that the defendants, the milk inspectors, by order of the defendant health officer, stationed themselves in the highway near plaintiff's distillery, stopped persons going to plaintiff's distillery with wagons suitable for carrying plaintiff's product, took their names and addresses, if unknown, and told them, in substance, that it was unlawful to sell or offer for sale any milk from cows to which plaintiff's product was fed, and that any person selling or offering to sell such milk would be fined. The evidence further shows that the manifest object of this was in part to collect evidence by getting the names and addresses of dairymen buying plaintiff's product in order to prosecute those selling such milk, and in furtherance of a plan to stop entirely the feeding of wet distillery waste or slop to cows whose milk was contemplated to be sold or offered for sale. There is no evidence that the health officer was not in good faith endeavoring to enforce, and prevent the violation of, what he in good faith believed to be the law, to wit: that milk from cows to which *any* wet distillery waste or slop whatever was fed, could not lawfully be sold or offered for sale.

The act of April 30, 1908 (99 O. L. 239), makes it unlawful "to sell, exchange or deliver with intention to sell or expose for sale or exchange, milk from cows fed on wet distillery waste or starch waste."

Plaintiff claims that such act is applicable only to milk from cows fed on waste exclusively, or substantially so, and not to milk from cows fed on such waste in proper proportion with hay or other similar roughage; that the words, "fed on" imply and mean an exclusive diet, or at least a regular and substantial part of diet.

The evidence does not show that any one was deterred from buying plaintiff's product, except dairymen who were buying it for the purpose of feeding it, to some extent at least, to their cows whose milk was put on the market; or that the actions of the health officer and his employees were in any degree whatever, for the purpose of causing any loss of

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business to plaintiff, or that there has been or will be any loss of business to plaintiff in the sale of its product, except such as is or will be the inevitable results of the discontinuance by dairymen of the feeding to any extent whatever, of plaintiff's product to cows whose milk is sold or offered for sale. There is no evidence that plaintiff's customers are being deprived of a full opportunity to test the act, as construed by the health officer, by any failure on his part to prosecute the violators of the law as he construes the law to be; or that plaintiff or any of its employes is, by said construction, liable to civil or criminal prosecution, or in danger of being made a party in any multiplicity of suits civil or criminal by reason of what the health officer may do under his construction of the act.

The only right pertaining to property which may be affected by the contemplated prosecutions is the right to market milk from cows to which plaintiff's product may be fed. Plaintiff sells its product, but does not claim any property right in any such milk.

It is the duty and right of the health officer under the direction of the board of health to enforce, and endeavor to prevent the violation of, all laws which pertain to the milk supply of the city as he in good faith, after consulting his proper legal advisor, believes the law to be. In so doing, it is his duty in a lawful manner to collect evidence of violations or probable violations of the law, and he may, for the purpose of preventing violations thereof, notify individuals and the public of what he in good faith believes the law to be, and for the purpose of preventing the violations of such law may give warning to probable violators thereof of his intended prosecutions under the law, provided the methods used are in the reasonable exercise of the executive discretion conferred on him by the law. When so acting, the question whether he is correct in his construction of the law, so long as the enforcement of his construction is contemplated or threatened by criminal prosecution only, can ordinarily be determined only in such criminal prosecution as may be instituted for its enforcement.

A court of equity will not interfere with an executive officer charged with the duty of protecting the public from violations of penal statutes and prosecuting the violators thereof, so long as such officer acts reasonably and in good faith within the executive discretion conferred on him by his office. Neither will a court of equity interfere in criminal prosecutions pending or contemplated unless, with other necessary conditions, violations of property rights are clearly threatened. Such rights must necessarily be those of the party invoking the action of the court.

The evidence offered upon the hearing of this motion does not establish that the health officer or his milk inspector went beyond the

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reasonable exercise of the executive discretion conferred on them by virtue of their office, and does not establish that any property rights of plaintiff will be affected by any prosecutions which may be instituted by the health officer under the law as he construes it, even if erroneously so construed.

The temporary restraining order heretofore granted should therefore be dissolved.

The question as to the construction and constitutional effect of the words "fed on" in the act of April 30, 1908, commonly known as the slop feed act, is neither necessary nor proper to be determined in this case,

INSURANCE.

[Lorain Common Pleas, December 21, 1907.]

UNION AGRICULTURAL SOC. V. ANCHOR FIRE INS. CO.

PAROL EVIDENCE INADMISSIBLE TO VARY CONDITION AS TO TITLE OF LAND ON WHICH IT IS SITUATED.

A fire insurance policy contained a condition that the "entire policy, unless by agreement endorsed hereon or added hereto, shall be void * * * if the subject of the insurance be a building on ground not owned by the insured in fee simple," and also a provision that no officer, agent or representative of the company should have power to waive any of the provisions or conditions of the policy "unless such waiver, if any, shall be written upon or attached to" the policy: *Held*, that unless reformed, such a policy cannot, in the absence of agreement or waiver endorsed thereon, be enforced as covering a building located on ground not owned in fee simple by the insured; and, in an action on such policy, parol evidence is not admissible to show that the facts as to title of the property were known to the agent of the insurer when he accepted the application for the insurance, delivered the policy and received the premium.

[Syllabus by the court.]

MOTION for new trial.

J. T. Haskell and Stroup & Fauver, for plaintiff.

F. D. Prentice and W. B. Johnston, for defendant.

WASHBURN, J.

This is an action brought by the plaintiff against the defendant to recover for a loss occasioned by fire under the terms and conditions of a certain policy issued by the defendant to the plaintiff.

The policy, as stated therein, covered insurance as follows: "\$300 on frame, shingle roofed building, occupied as Floral Hall, situated on the east side of the Wellington Agricultural Society grounds," and said policy contained the following condition:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest

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of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple;" and also the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of the policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

As a defense to the action the defendant pleaded the foregoing conditions and alleged that said plaintiff was not the unconditional and sole owner of said property, nor did it own the ground upon which said building was situated, and for that reason said policy was null and void.

In reply thereto the plaintiff alleged that at the time the policy of insurance was drawn up and delivered to the plaintiff the defendant well knew and fully understood that the land on which the building in question was insured was not owned in fee simple by the plaintiff, but that the plaintiff was the owner of a lease of the same for ninety-nine years; that fully understanding said facts the defendant itself drew up said policy and delivered the same to the plaintiff, and that the plaintiff in no wise misrepresented to or concealed said facts as to the ownership of said land or the interest of the plaintiff in said land from the defendant, and claimed that the defendant was estopped from setting up the claim that the plaintiff was not the unconditional and sole owner of the land on which the building in question was situated.

Upon the trial of the case plaintiff offered evidence tending to prove that the agent of the defendant who issued the policy knew at the time it was issued that the building in question stood upon leased land and that the plaintiff was not the owner in fee simple of such land. Objection was made to this testimony, which objection was overruled and exception noted.

The real ground of the objection was not stated to the court at the time of the trial, and the plaintiff's claim appearing to be a meritorious one and the defense a highly technical one, the court, in the hope that there might be found some legal ground upon which to support this action, admitted the testimony, and the jury were instructed that if the company knew of the condition of the title at the time the policy was issued that it was estopped to claim that condition as a defense, and

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the jury having found for the plaintiff, the question is now before the court upon a motion for a new trial.

Since said trial the court has had an opportunity to make an investigation of the law on the subject that could not be made during the trial, and I have come to the conclusion that under the law as it is, no successful suit can be maintained on this policy, at least, without reforming the policy, and by this remark I do not mean to intimate that there was any evidence introduced at the trial which would warrant a reformation of the policy.

It seems that in early times in this country insurance policies were construed strictly against the insurance company and in favor of the insured, on the theory that the policy was prepared by expert attorneys employed by the company and contained many restrictions and conditions printed in fine printing and in such a manner as not to be readily understood by the insured, and many of the decisions sustaining recoveries on policies were rendered before the policies contained the condition last above referred to in reference to the authority of the agent to waive any of the conditions or provisions of the policy unless the waiver was in writing indorsed upon such policy. And even after such condition was contained in the policies it was held that such restrictions upon the power of the agent could not be deemed to apply to those conditions which related to the inception of the contract when it appeared that the agent had delivered the contract and received the premiums with a full knowledge of the actual situation, and it was said that to take the benefit of a contract with full knowledge of all the facts and attempt afterwards to defeat it when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made and thus operate as a fraud upon the insured. That was the theory that I took of this case when it was submitted. It seemed to me that if the insurance company knew that the property insured was upon leased ground and issued a policy stating that if it was upon leased ground the policy should be void, that it thereby issued a policy which it knew at the time of its issue was void and accepted pay therefor, and that such a transaction was a fraud upon the insured and that it was the duty of the court to relieve against such fraud.

But the later decisions, while recognizing the rule that ambiguous language in an insurance contract is to be construed against the company, determine that "policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties" (*Travelers Ins. Co. v. Myers*, 62 Ohio St. 529 [57 N. E. Rep. 458; 49 L. R. A. 760]), and it has accordingly been held that where an insured accepts a policy he is thereby assumed to know of the terms of the contract contained therein and is bound by them to the same extent as if the contract had been discussed and all

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of its conditions had been carefully considered and agreed upon and then reduced to writing by the parties and signed by them (*Union Cent. Life Ins. Co. v. Hook*, 62 Ohio St. 256 [56 N. E. Rep. 906]); and by the great weight of authority it is held that parol evidence is not admissible to show that when the contract was entered into, the agent and the insured agreed upon other and different terms than those contained in, or indorsed upon, the policy, and that the knowledge of the agent of the company of facts which rendered the policy void when issued could not be received in evidence in an action at law upon a policy for the purpose of estopping the company from asserting the invalidity of the policy on grounds which the agent knew at the time of the issuing of the policy rendered the policy void.

In an early case in Ohio where the insured informed the agent fully of the condition of the title to his property and the agent advised him that the transaction he fully explained to him did not amount to an incumbrance upon the property and accordingly wrote in the application that the same was owned by the insured and was not incumbered, when as a matter of fact the transaction amounted in law to an incumbrance upon the property, and while it was held in that case that a court of chancery had power to reform the policy, it was further held that: "The written application being a part of the policy, the representations therein contained amount to a warranty, and if they are untrue the policy is void. Nor can parol testimony, in the absence of mistake on the part of the assured, and misrepresentation on the part of the insurer, be received to explain or contradict a written application; nor to say, that in fact the insurer or his agent knew the true state of facts." And it was said in that case if the insured under those circumstances "had chosen to put down his property as unincumbered, when it was not of his own will, without any mistake on his part, or any inducement on the part of the company or their agent, to do so, the policy would have been void, although the company were acquainted with the true situation of the property." *Harris v. Insurance Co.* 18 Ohio 116.

In another case it was said:

"The fourth point of controversy relates to that condition of the policy which declares that 'in case of any other insurance upon the property, not notified to said company, and mentioned in or indorsed upon this instrument, then this policy shall be void and of no effect.' The importance of this condition, and the necessity of complying with it on the part of the insured, were considered by this court, at great length, in a former hearing of the case; and the conclusions then arrived at, by a majority of the court, are sanctioned and confirmed by us all, and have been sustained by fresh authority. They were, that in an action on the policy no other evidence than that provided for in the

contract itself could be received to show that notice of prior or subsequent insurance had been given; or to prove a waiver of the condition itself, made at the time of delivering the instrument." *Fellows v. Insurance Co.* 13 Dec. Re. 79, 85 (2 Disn. 128).

In another case:

"If, however, the insured seeks any relief from acts of the insurance company, or its agent, before the delivery of the policy, and attempts to prove, by prior statement and conduct, that the contract is different from the one actually signed (in the absence of a claim of fraud vitiating the same), his acceptance of the written contract under the circumstances should merit the usual punishment prohibiting the introduction of oral evidence to alter the terms of the policy, and the interests of all parties would be best subserved by relegating the insured to a court of equity to reform his contract and to show, by the more stringent rule to be there applied, that his claim in equity is supported by clear, convincing and satisfactory evidence, and that the signed policy is not the actual contract entered into between them. Oral agreement or statements made prior to or contemporaneously with the written policy to be available are, therefore, to be set up in an action to reform such instrument." *Kehm v. Insurance Co.* 11 Dec. 739, 752 (8 N. P. 542).

"In an action to recover on a written contract for life insurance and upon an alleged subsequent verbal modification of the same, statements and representations made by the agent who solicited the policy, prior to and contemporaneous with the issue of the policy, are inadmissible to vary, in any respect, the terms of the written policy. In the absence of proof of fraud or mistake, such statements and representations are merged in the written contract." *Union Cent. Life Ins. Co. v. Hook*, 62 Ohio St. 256 [56 N. E. Rep. 906].

"When such policy contains a stipulation that 'no agent has authority to waive or alter anything in this policy contained,' and the same is accepted by the insured, it is both notice to and an agreement by, the insured that an agent has no authority to waive or alter anything contained in the policy." *Travelers Ins. Co. v. Myers*, 62 Ohio St. 529 [57 N. E. Rep. 458; 49 L. R. A. 760].

This strict rule of excluding parol testimony to vary the terms of a written contract is enforced in insurance cases even as to a condition subsequent, such as where the policy contains a provision that it shall be void if the personal property insured shall be thereafter moved to another location without the consent of the company in writing attached to the policy.

"A clause in a policy of fire insurance, covering personal property, to the effect, that if the subject of the insurance be or become incum-

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bered by chattel mortgage unless otherwise provided by agreement endorsed thereon, the policy shall be void, admits of no construction, and evidence that assured informed the agent, when the insurance was obtained, that the property was so incumbered, is inadmissible, as varying the terms of the original contract and such facts involve no question of waiver." *Hammel v. Insurance Co.* 24 O. C. C. 101, 102 (4 N. S. 380).

"Where goods insured 'while located and contained as described herein, and not otherwise' under a standard form policy, are removed to another location without the written consent of the company to such removal indorsed upon the policy, there can be no recovery under the policy for loss by fire sustained after such removal, notwithstanding the insured notified the agent of the company of the proposed removal and the agent said he would attend to the matter and see that the proper entries were made so that the insurance would be preserved." *Welsh & Co. v. Insurance Co.* 27 O. C. C. 313 (6 N. S. 1).

A condition in reference to the title to the property insured is on principle the same as a condition in reference to the existence of other insurance upon the property, and it has been determined by the Supreme Court of the United States in a comparatively recent case that:

"An insurance company cannot be deemed to have waived a condition in a policy of fire insurance rendering it void in case other insurance had been or should be made upon the property unless by agreement indorsed thereon or attached thereto, because its agent had notice or knowledge of the existence of other insurance in another company at the time he delivered the policy and received the premium, where such policy also provided that 'no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto: and as to such provisions or conditions no officer, agent, or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.'" *Northern Assur. Co. v. Building Assn.* 183 U. S. 308 [22 Sup. Ct. Rep. 133; 46 L. Ed. 213].

In the case at bar it is conceded that the subject of insurance was "a building on ground not owned by the insured in fee simple," and it follows that by the terms of the policy said policy was void and no recovery could be had upon said policy, and the court erred in admitting testimony tending to show that the company knew of the condition of the title at the time the policy was issued, because the only knowledge

it was claimed the company had was the knowledge on the part of the agent issuing the policy, and parol testimony of his knowledge was not admissible to vary the express terms of the policy.

The motion for a new trial will therefore be granted.

CORPORATIONS—PARTNERSHIP.

[Hamilton Common Pleas, April 27, 1909.]

*STATE EX REL. GUILBERT, AUD., V. JOHN KILGOUR ET AL.

1. BANKING PARTNERSHIP HELD NOT A BANKING INSTITUTION.

"Institutions" comprehends "corporations" or "associations," established by law, having the attributes of permanency, as distinguished from the temporary establishment of individual or partnership effort, together with officers and members; hence, a banking partnership is not an "institution" within the meaning of Secs. 3817 and 3818 Rev. Stat., requiring "every banking institution, or corporation engaged in the business of banking" to file certain reports, verified by its officers.

2. BANKING PARTNERSHIP NOT REQUIRED TO FILE REPORT WITH STATE AUDITOR.

Sections 108 and 109 of act 99 O. L. 269, the former acquiring "every banking company, savings bank, * * * and every person or copartnership doing a banking business," to make certain reports, and the latter requiring the president, vice president, cashier, secretary or treasurer to verify such reports, neither expressly nor by necessary implication require a banking partnership to make reports as required by Secs. 3817 and 3818 Rev. Stat.

3. GRANTING LEAVE TO AMEND ORIGINAL PETITION SAVES THE RUNNING OF THE STATUTE OF LIMITATIONS.

Granting leave to file an amended petition implies, necessarily, that no new action was commenced by filing such pleading; hence, the bar of the statute not having run against the cause of action set forth in the original petition, will not bar recovery under the amended petition.

4. PRESENTATION TO PERSONAL REPRESENTATIVE OF CLAIM NOT NECESSARY UPON SUIT BEING BROUGHT AGAINST DECEDENT BEFORE DECEASE.

An action having been commenced in the life of a party defendant upon revivor in the name of his personal representative after defendant's death no presentation to such representative is required.

5. QUESTIONS DECIDED BY ONE JUDGE ON MOTION FOR LEAVE TO FILE AMENDED PETITION, DEEMED CONCLUSIVE ON SUBSEQUENT HEARING BY ANOTHER JUDGE.

Leave to amend a petition by substituting new parties having been granted by a common pleas judge, it appearing that a copy of the amended petition was attached to the motion to amend, the question of the sufficiency of the amended petition as to new parties plaintiff and defendant, and averments necessarily passed upon in granting the motion will not be considered by another judge of the same court upon a subsequent hearing upon the amended petition.

[Syllabus approved by the court.]

DEMURRER to petition.

Kinthead, Rogers & Ellis, for plaintiff.

*For prior decision in this case, see *Guilbert v. Bank*, 18 Dec. 115 (5 N. E. 209).

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E. W. Kittredge and Jacob Shroder, for defendants:

A banking partnership not an "institution" within the meaning of the statute. *Dearborn v. Bank*, 42 Ohio St. 617 [51 Am. Rep. 851]; *State v. Wilson*, 29 Ohio St. 347; *State v. Jennings*, 57 Ohio St. 415 [49 N. E. Rep. 404; 63 Am. St. Rep. 723]; *State v. Halliday*, 61 Ohio St. 171 [55 N. E. Rep. 175]; *Western Counties Steam Bakery, In re*, 1 Chan. 627; *McCornick v. Pratt*, 8 Utah 294 [30 Pac. Rep. 1091; 17 L. R. A. 243].

Repeal of the statute by the Thomas act. *Calkins v. State*, 14 Ohio St. 222; *Johnson v. Jordan*, 43 Mass. (2 Metc.) 234; *McNeil v. Hagerty*, 51 Ohio St. 255 [37 N. E. Rep. 526; 23 L. R. A. 628]; *Sargent v. Railway*, 32 Ohio St. 449; *Dubuque v. Dubuque*, 7 Iowa 262.

Bar of the statute of limitations. *Galpin v. Lamb*, 29 Ohio St. 529; *Spoors v. Coen*, 44 Ohio St. 497 [9 N. E. Rep. 132]; *Grant v. Hyde Park*, 67 Ohio St. 174 [65 N. E. Rep. 891]; *Roe v. Doe*, 30 Ga. 873; *United States v. Arredondo*, 31 U. S. (6 Pet.) 709 [8 L. Ed. 547]; *Dudley v. Price*, 49 Ky. (10 B. Mon.) 84; *Lagow v. Neilson*, 10 Ind. 183; *Hawthorn v. State*, 57 Ind. 286; *Hills v. Ludwig*, 46 Ohio St. 373 [24 N. E. Rep. 596]; *Larwill v. Burke*, 10 Circ. Dec. 579 (19 R. 449); *Marriott v. Railway*, 14 Dec. 596 (2 N. S. 231).

GORMAN, J.

This is an action brought originally by W. D. Guilbert, auditor of the state of Ohio, against the Franklin Bank, a partnership alleged to have been engaged in the banking business prior to the time of the commencement of the action in the city of Cincinnati, asking for a judgment against the Franklin Bank in the sum of \$3,120 for the benefit of the state of Ohio, on account of penalties alleged to have been due and payable at the date of the commencement of the action because of the failure of said bank to make a report to the plaintiff Guilbert, as auditor of state, showing the condition of said bank at the close of business, March 5, 1905, as provided by Secs. 3817 and 3818 Rev. Stat. of Ohio as amended April 23, 1904. Such proceedings were had in the case, as that an answer was filed setting up that John Kilgour, J. D. Brannon, and Charles H. Kilgour were partners doing business under the firm name of the Franklin Bank, but denied that they were engaged in the banking business; and as a second defense set up that they were brokers as defined by Sec. 3821-20 Rev. Stat. of Ohio. As a third defense the defendants set up that they have no officers to make a report required by Secs. 3817 and 3818 Rev. Stat., and that they are neither a banking "institution" or "corporation" and were not obliged to make any report as required by the provisions of said sections.

On the day the case was called for trial before a jury, the de-

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fendant moved to dismiss the cause on the ground that the plaintiff had no authority to bring or maintain the action in his name as plaintiff.

The motion was submitted to Judge Otto Pfeleger, and after a thorough and vigorous presentation of the question raised by the motion, Judge Pfeleger in an exhaustive opinion, *Guilbert v. Bank*, 18 Dec. 115 (5 N. S. 209), held that the motion was well taken, but plaintiff's counsel in the meantime, having asked leave to amend by substituting as plaintiff the state of Ohio instead of W. D. Guilbert, auditor, and as defendants John Kilgour, J. D. Brannon and Bayard L. Kilgour and Alfred J. Becht as administrators of the estate of Charles H. Kilgour, deceased, instead of the Franklin Bank, Judge Pfeleger, on December 31, 1908, his last day in office, granted leave to file the amended petition now under consideration, and the same was duly filed on said day. The caption of the original case is entirely changed by the amendment, and both the parties, plaintiff and defendant, are changed and new parties substituted. The prayer of the original petition was for a judgment against the Franklin Bank in favor of W. D. Guilbert, auditor of the state of Ohio, for the benefit of the state of Ohio in the sum of \$3,120 and costs.

The prayer of the amended petition is for a judgment in favor of the relator in the name of the state of Ohio and for the benefit of the state of Ohio and against John Kilgour, J. D. Brannon and Bayard L. Kilgour and Albert J. Becht as administrators of Charles H. Kilgour, deceased, successors in interest of the said The Franklin Bank in the sum of \$3,120 and costs.

To this amended petition each of the defendants has filed a separate demurrer, but each demurrer is based on the same grounds, to wit:

1. The amended petition does not state facts sufficient to constitute a cause of action against the demurring defendant.
2. The alleged cause of action in said amended petition is barred by the statute of limitations.
3. The separate alleged causes of action against the several defendants are improperly joined.

The points raised by these demurrers were ably and exhaustively argued orally *pro* and *con*, and exhaustive and well prepared briefs have been submitted to the court for its information. Indeed, it is seldom that a case has been so well prepared and presented by such learned and distinguished counsel on both sides. The court is greatly indebted to counsel for the valuable assistance rendered in their oral arguments and briefs, and can only say that if the conclusions arrived at are not correct, counsel may, at least, rest assured that the court has given the case his best consideration, and so far as the court is able to discover, counsel are not at fault in the presentation of the case.

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At the outset the court is confronted by the decision of Judge Pfleger on the application of plaintiff's counsel for leave to file his amended petition. In order to grant leave to file this pleading, Judge Pfleger found, and must necessarily have found, that the parties defendant in the amended petition, as well as the new party plaintiff, the state of Ohio, are the real parties in interest and the proper and necessary parties to this action. It appears that attached to the motion for leave to file this amended petition was a copy of the pleading sought to be filed, and therefore the court, Judge Pfleger, was fully advised of the new parties plaintiff and defendant, as well as every averment contained in the amended petition as filed. I am, therefore, of the opinion that I ought not to consider any question in this case involved, or necessarily involved, in Judge Pfleger's decision, and which he must necessarily have passed upon in order to grant leave to file the amended petition.

This leaves but the following points raised by the demurrers of the defendants to be considered and passed upon by me, viz:

1. Was the Franklin Bank a partnership, doing business under that name in Ohio, for one year prior to June 24, 1905, (the date of the filing of the petition) a "banking institution" within the meaning of Secs. 3817 and 3818 Rev. Stat.?

2. Were Secs. 3817 and 3818 Rev. Stat. repealed by Sec. 120 of the act of May 1, 1906, known as the Thomas act, so as to bar a recovery in this action against the defendants?

3. Is the cause of action set up in the amended petition barred by the statute of limitations, Secs. 6805 and 4983 Rev. Stat.?

As to the first proposition, it is averred in the amended petition, and for the purpose of the demurrer must be admitted to be true, that the Franklin Bank was at the time of the commencement of this action and continuously during the year immediately prior to March 6, 1905, a banking institution, and during said times was engaged in the business of banking in Ohio. We must therefore assume for the purposes of the demurrer that the Franklin Bank was engaged during said times in the business of banking in Ohio.

But was it a "banking institution" within the meaning of Secs. 3817 and 3818 Rev. Stat.?

An averment that it was a "*banking institution*" is not an averment of a conclusion of fact, but a conclusion of law, and therefore, the demurrers do not admit this conclusion of law, and the court may test this averment, to determine whether or not the Franklin Bank is an "institution" within the meaning of the said sections.

The question of its business is eliminated. Its business is that of

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banking so far as the inquiry now under consideration is concerned.

It is urged with great force by counsel for the defendants that the Franklin Bank was not a "banking institution" or "corporation" and that inasmuch as these are the only entities designated in Secs. 3817 and 3818 Rev. Stat., the Franklin Bank was not obliged to make the reports required to be made under those sections. The question of whether or not the defendants were engaged in banking is a question of fact and therefore the reference to the section of the statutes defining brokers cannot avail at this time. If the Franklin Bank was engaged in a brokerage business and not in the banking business, that issue must be raised by answer and not by these demurrers.

It is not averred that the Franklin Bank was a corporation and therefore we need only inquire whether or not a partnership may be in law an "institution," for if it may be, then the Franklin Bank is a "banking institution," at least for the purposes of the demurrers.

It is contended that the use of the words, "banking institution" in Sec. 3817 indicates that a *body* of persons, organized under the laws of the state was thereby intended to be described, and that this construction is borne out by the further facts that in this very Sec. 3817 it is provided that "*institutions*" known as building and loan associations organized and conducted under the statutes for such *institutions* are not required to make reports; and further that the report required must be verified by the oath, etc., of one or more of the officers of the institution as provided in Sec. 3818 Rev. Stat. It is pointed out that neither individuals nor partnerships can have or do have officers, and therefore applying the rule of *ejusdem generis*, institutions must mean and have reference to corporations or associations having officers.

"Institution" is defined in 16 Am. & Eng. Enc. Law (2 ed.) 822, 823, as follows:

"The term 'institution' is sometimes used as descriptive of the establishment or place where the business of a society or association is done or its operations are carried on, and at other times it is used to designate the organized body."

Citing: *Indianapolis v. Sturdevant*, 24 Ind. 391; *Appeal Tax Ct. v. St. Peters Academy*, 50 Md. 321, 345; *Gerke v. Purcell*, 25 Ohio St. 229, 244; *Humphries v. Little Sisters of Poor*, 29 Ohio St. 201; *Morris v. Lone Star Chap. No. 6 R. A. M.* 68 Tex. 698 [5 S. W. Rep. 519].

The above definition in 16 Am. & Eng. Enc. Law, 822, 823, was taken verbatim from the case of *Gerke v. Purcell*, *supra*, page 244.

The court in that case had under consideration Art. 12, Sec. 2. of the constitution of 1851, which provides among other things for the exemption from taxation of "institutions of purely public charity,"

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and while the court therein held that the word "institution" as used in the section of the constitution and the act of the legislature under consideration, had reference to the establishment or place where the operations of the society or association are carried on, or the property of the "institution," because the property was to be affected, nevertheless, the court discusses the use of the word as designating the organized body known as the *society* or *association*.

In the case of *Humphries v. Little Sisters of Poor*, *supra*, the court again had under consideration the same section and article of the constitution and the same taxation statute as were involved in the case *Gerke v. Purcell*, *supra*. The court in *Humphries v. Little Sisters of Poor* defined institution when used to designate the organized body in the second paragraph of the syllabus and on page 206 as follows:

"The word 'institutions,' in the sixth clause of Sec. 3 of the tax law, (of 1859) is used to designate the *corporation* or *other organized body instituted to administer the charity, etc.*"

It would seem from these two authorities that the idea in the mind of the Supreme Court of this state of the word "*institution*" presents either a *corporation* or a *permanently organized society or association*; at least, this appears to be the court's conception of the word when used in connection with taxation or exemption from taxation and as used in the section and article of the constitution above referred to. The word "institution" is used in several places in the constitution of 1851, viz., Art. 3, Sec. 20; Art. 7, Secs. 1 and 2. But in every instance it is used in the sense of a permanent organized body or the place where the organized body administers the charity or trust, or dispenses the benefits for which the association, society or corporation is organized, and in all but one of these sections the *officers* of the institution are mentioned.

In the case of *Dodge v. Williams*, 46 Wis. 100 [1 N. W. Rep. 92; 50 N. W. Rep. 1103], the court said:

"The words 'institution' and 'organized' appear to imply an incorporation. A private school or college may by courtesy be called an '*institution*' according to the American fashion of promoting people and things by brevet names. But in legal parlance an *institution* implies foundation by law, by enactment or prescription. One may open and keep a private school; he cannot properly be said to *institute* it."

See also, *Nobles Co. v. Hamline University*, 46 Minn. 316 [48 N. W. Rep. 1119], where the court among other things says:

"The term '*institution*,' although sometimes used as descriptive of the establishment or place where a business is carried on, properly

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means an association or society organized or established for promoting some specific purpose." * * *

See also, *Montana Catholic Missions v. Lewis & Clarke Co.* 13 Mont. 565 [35 Pac. Rep. 2]; *Kentucky Female Orphan School (Tr.) v. Louisville*, 100 Ky. 470, 486 [36 S. W. Rep. 921; 40 L. R. A. 119].

In all these cases where the word was under consideration the idea conveyed to the minds of the courts was a society, corporation or association established by law or organized and instituted as a permanent thing having officers and members, and possessing the attribute of immortality, or at least, indefinite existence, and unaffected by the death of one or more of its members. In no sense where the property or place is not referred to, but the agency or instrumentality, is there any intimation that an institution is an individual or partnership. If the institution, speaking of the body, could be an individual or partnership, then the death of the individual or of one or more of the partners would be the death of the *institution*, and the idea of permanency could not be conceived as an attribute of an institution. Yet the very name *institution* carries with it the idea of permanency as distinguished from the temporary establishment of an individual or partnership effort.

But it is urged by counsel for plaintiff that the mere fact that the legislature provided in Sec. 3817 Rev. Stat. that "banking institutions" as well as "every corporation engaged in the business of banking" shall make reports to the auditor of state, shows that the legislature intended to reach banking concerns other than corporations, and that the use of the words "banking institution" and "corporation engaged in the business of banking" shows that the legislature thus recognized the distinction between a "banking corporation" and a "banking institution."

This argument appears plausible, but a reference to the statute (Sec. 3817) shows that the words are not used in the conjunctive but in the disjunctive. The language is: "Every banking institution, *or* corporation engaged in the business of banking, * * * shall make not less than two reports," etc. If the word "*and*" had been used instead of "*or*" then the argument of counsel for plaintiff that the legislature intended to include two classes of "banking concerns," to wit, "institutions" and "corporations" would appeal to the mind with irresistible force. The language would then be: "Every banking institution *and* corporation engaged in banking, * * * shall make not less than two reports," etc. But the use of the disjunctive "*or*" furnishes a strong argument in favor of the defendant's contention that "institution" and "corporation" are used to indicate and mean practically the same thing; an association of persons other than an

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individual or a partnership, engaged in the banking business. And when, in connection with the fact that the word "*institution*" is a broad enough and large enough term to include corporation as well as other organized bodies not corporations, the further fact is considered, that *officers* are to make and verify these reports, the argument advanced by counsel for defendants in favor of their contention is much more potential. The word "*officer*" and "*officers*" are inseparately associated with corporations or organized bodies or associations and never with individuals or partnerships.

Furthermore, at the time this legislation embodied in Secs. 3817 and 3818 providing for these reports was passed in 1904, the legislature presumably had in mind the laws relating to banking and the banking business as well as the laws relating to the creation and organization of corporations. Now, the chapter relating to the creation and organization of corporations, both for profit and not for profit, Chap. 1, Title 2, provides, Sec. 3235 that: "Corporations may be formed in the manner provided in this chapter (Chap. I) for any purpose for which individuals may lawfully associate themselves," etc. This includes banking, and as a matter of fact, most of the banking institutions of the state are organized under this chapter. There must be not less than *five* persons, a majority of whom are citizens of Ohio, to form and organize a corporation, whether for profit or not, and for whatever purpose, under this chapter. See Sec. 3236 Rev. Stat.

Now under Chap. 16a, of this same title, 2, under the free banking act, Secs. 3821-64 to 3821-87 (Lan. 6178 to 6201) Rev. Stat., any number of natural persons not less than *three* may engage in the banking business, etc. These persons who may thus engage in the business being *not less than three* and as many more as the promoters see fit to take in, are not called a *corporation*, but a *banking company*. They are not, as under Chap. I, Title 2, required to use the word "*company*" or the word "*the*," and while it may be considered a corporation, such an organization is no place in the statute so designated, but only as a "*company*." It is not chartered as corporations under Chap. I, Title 2, but is required to file and record its certificate of organization with the recorder of the county wherein it is to transact its business, and it may have officers as well as directors, and before engaging in business, must have 60 per cent of its stock paid in and a certificate from the governor, auditor of state and secretary of state, to enable it to do business. It is then clothed with the power of a body politic and corporate. This free banking act was on the statute books at the time of the adoption of the constitution of 1851, and was not repealed until the Thomas act of May 1, 1908, (99 O. L. 292) was passed. Many banking concerns are doing business now in Ohio under

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this free banking act, and the court has personal knowledge of two or three banks now doing business in Hamilton county organized under this free banking act within the last *four years*.

Now is it not reasonably probable that it was just such banking concerns as these under the free banking act that the legislature intended to designate as "banking institutions" to distinguish them from corporations organized under Chap. 1, Title 2, Rev. Stat.?

It is not now and was not before the passage of the law of May 1, 1908, (99 O. L. 292) unlawful for an individual or partnership to engage in the business of banking, but unless the legislature by clear and unmistakable language requires an individual or partnership to make reports of their business, whether the same be a banking business or a grocery business, the duty to make such reports ought not to be required by intendment; nor ought there to be any judicial legislation by reading into the statutes what is not there plainly laid down or *necessarily* implied. The rule applicable to natural persons cannot always be applied to corporations which are mere creatures of the legislative branch of the government, and therefore, any reasonable requirements which the creator of these creatures may prescribe, and any rules which the legislature desires to promulgate as conditions under which corporations and associations which owe their being to the state, may engage in business, cannot be questioned so long as there is no taking of property without due process of law. The creator may destroy and may also prescribe the orbit within which its creatures shall move and have their being.

But the application of this rule to natural persons and their lawful callings, occupations and affairs is abhorrent to the spirit of our free institutions and contrary to our sense of natural justice.

By Sec. 108 of the act of May 1, 1908, (99 O. L. 269) commonly known as the Thomas act, 292, it is provided first that every banking company, savings bank, savings and trust company, safe deposit and trust company, society for savings, or savings society, etc., and every person or copartnership doing a banking business shall make, etc., not less than four reports, etc. Now the words "person" and "copartnership" were not used in either Secs. 3817 or 3818 Rev. Stat., and from the fact that the legislature in this recent enactment has included "persons" and "copartnerships" among the list of banking concerns and banking houses required to make the reports now to the superintendent of banks, formerly made to the auditor of state, indicates that "persons" and "copartnerships" were exempted from making such reports prior to the passage of the act of May 1, 1908, and it was because the legislature knew of this exemption, that provision was made for

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the reports from "persons" and "copartnerships" as well as corporations in the act of May 1, 1908.

Now counsel for plaintiff urge that inasmuch as Sec. 109 of the act of May 1, 1908, provides that such reports shall be verified by the oath or affirmation of the president, etc., and inasmuch as now under this last act by Sec. 108 "persons" and "copartnerships" shall also make the reports, that therefore by necessary implication, "persons" and "copartnerships" were required to report under Secs. 3817 and 3818 Rev. Stat., because if now the president, vice president, cashier, secretary or treasurer under Sec. 109 shall verify the report, and this applies to "persons" and "copartnerships" as Sec. 108 would indicate, then there is no more inconsistency or incongruity in holding that the words "one or more of its officers" used in Sec. 3818 Rev. Stat., may just as well apply to "persons" and "copartnerships" doing a banking business before the passage of the act of May 1, 1908, than to hold as we must necessarily hold that under this last act the words "president," "vice president," etc., are applicable to "persons" and "copartnerships" doing a banking business as well as to corporations.

But a reading of Sec. 109 of the act of May 1, 1908, discloses that there is no provision for a verification of the report by "persons" or "copartnerships" but that the statement or report required to be verified has reference only to a "banking company, savings bank, society or association above named." The words above named have reference to the same institutions named in Sec. 108 of the said act. Section 111 of the act provides that the superintendent of banks may call for special reports from the "companies," "societies," and "corporation," but not from "persons" and "copartnerships."

By Sec. 112, Every *company, society or association* failing to make or publish the reports required by the act, shall be subject to a penalty of \$100 for each day they are delinquent after ten days' notice, but no penalty is imposed on the "person" or "copartnership" doing a banking business, who fails to make the reports. It would seem, therefore, that even now, "persons" and "copartnerships" cannot be proceeded against for failure to make these reports, although they are specially required so to do by Sec. 108 of the act, nor are they required to verify their reports so far as the act of May 1, 1908, is concerned, and if this be true under an act which specifically enjoins upon "persons" and "copartnerships" the duty of making these reports, how can it be claimed that where "persons" and "copartnerships" are not mentioned in the statutes, Secs. 3817 and 3818, nevertheless, by implication and intendment, the word "institutions" includes "persons" and "copartnerships" and requires them to make reports through officers having no existence?

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The court is of the opinion that it would be a forced construction to give to the word "institution," the meaning contended for by counsel for plaintiff, and that therefore, the amended petition does not state facts sufficient to constitute a cause of action against the defendants or either of them.

As to the point that the cause of action is barred by the statutes of limitations, I am of the opinion that Judge Pfleger must necessarily have passed upon this question by giving counsel for plaintiff leave to file the amended petition, and I do not feel that I am at liberty to question that decision of Judge Pfleger even if I were disposed to do so.

By giving plaintiff leave to file the amended petition, Judge Pfleger must have considered that no new action was commenced by the filing of the amended petition, but that the amendments allowed related back to the date of the filing of the petition and spoke as of that date. The petition was filed within the statutory time, and if the amendments relate back to the date of the filing of that pleading, then the cause of action set up in the amended petition was not barred by either the one year statute or the three years' statute.

As to the question of the presentation of the claim of the state against the administrators of Charles H. Kilgour, it appears that this action was commenced in the lifetime of Charles H. Kilgour and if there was a good cause of action against him it was not abated or discontinued by his death, and inasmuch as an answer was filed for him as well as for the other defendants, it would seem that he had thereby entered his appearance before his death; and inasmuch as Sec. 5012 Rev. Stat. provides that upon the disability of a party, the court may allow the action to proceed by or against his representative or successor in interest; and there was an entry *by consent* of parties made in this case on February 1, 1907, suggesting the death of Charles H. Kilgour and reviving the action in the name of his administrators and ordering it to proceed against them and the other two defendants as provided by Sec. 5149 Rev. Stat. I am of the opinion that the point involved here as to these facts was settled adversely to the contention of defendants' counsel by the decision of the Supreme Court in the case, *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258 [58 N. E. Rep. 805].

For the reasons stated the demurrers and each of them will be sustained on the ground that the amended petition does not state facts sufficient to constitute a cause of action against the defendants.

SUNDAY LAWS.

[Hamilton Common Pleas, August 1, 1908.]

GEORGE A. SCHLICHT V. STATE OF OHIO.

1. OPENING GROCERY STORE AND ENGAGING IN COMMON LABOR BY SELLING GOODS NOT A WORK OF CHARITY OR NECESSITY.

On Sunday, "engaging in common labor, by selling groceries and sausage, not being a work of necessity or charity," and "causing to be opened on said day a place for the transaction of business," etc., constitute a clear violation of Sec. 7033 Rev. Stat., and, in the absence of satisfactory evidence that the sales made were of a character that would bring them within a proper definition of works of necessity or charity, a conviction will not be set aside.

2. TRIAL FOR VIOLATING SUNDAY LABOR LAW AS FIRST OFFENSE PROPERLY BY MAYOR WITHOUT JURY.

Trial of one accused of violating Sec. 7033 Rev. Stat., prohibiting common labor on the first day of the week, commonly called Sunday, the affidavit charging a first offense, the penalty for which does not include imprisonment, may be had by a mayor without a jury.

[Syllabus approved by the court.]

ERROR to Mayor's court.

A. H. Morrill and A. P. Foster, for plaintiff in error.

T. H. Darby, for defendant in error.

WOODMANSEE, J.

This cause comes into this court on error from the court of the mayor of Delhi, Hamilton county, Ohio.

The affidavit in the case charges two offenses:

First. On Sunday, November 10, 1907, engaging in common labor, by selling groceries and sausage, not being work of necessity or charity; and

Second, causing to be opened on said day a place for the transaction of business, to wit: selling tobacco, sausages and other goods.

This proceeding is brought under Sec. 7033 Rev. Stat., which provides as follows:

"Whoever, being fourteen years of age, engages in common labor on the first day of the week, commonly called Sunday; and whoever, being over fourteen years of age, shall open or cause to be opened any building or place for the transaction of business on the first day of the week commonly called Sunday, * * * shall on complaint made within ten days thereafter and upon conviction, be fined, for the first offense, twenty-five dollars.

"But this section does not apply to or embrace work of necessity or of charity, and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and who do in fact abstain, on that day, from the doing of the things herein prohibited on Sunday."

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Trial was had, and the mayor found plaintiff in error guilty, and fined him \$50 and costs.

It is sought to set aside said finding and sentence of the court, because of various alleged errors in the proceeding before the mayor, as set out in the petition in error filed herein.

This court finds that the mayor of Delhi had jurisdiction to try this cause, and that it was not triable by jury, for the reason that the penalty, being for a first offense as charged in the affidavit, did not include imprisonment.

A careful examination of the evidence discloses that plaintiff in error did keep his place of business, which was a grocery, open on Sunday, November 10, 1907, for the transaction of business. Aside from the technical defenses made at the trial, the chief defense is that the store was kept open because it was a work of necessity, and the offense charged thereby came under the exception provided by the statute. This law was originally passed by the Ohio legislature in 1831 (29 O. L. 161), was slightly amended in 1864 (61 O. L. 104), and was again amended and put in its present form in 1898 (93 O. L. 358).

What are works of necessity, contemplated in the statute? We must not place upon it any strict construction, and say it applies only to services rendered in caring for our "personal safety and the safety of our property." Measured by this rule is it a work of necessity for a grocer to carry on his ordinary business on the first day of the week? A necessity referring to a circumstance—to an act, is that which is unavoidable—that which is inevitable. This is the dictionary definition. The fact that the grocers of Ohio almost universally do not carry on business more than six days in the week would lead us to infer that they find no necessity to do otherwise. Special sales made by grocers under certain circumstances on Sunday might come within the classification of a necessity, but to keep the store open for the purpose of selling to all who may come is in law considered not to be a necessity, and such act is a violation of this statute. In the case before us the evidence does not show the necessity of any sales made on the day in question. If the defendant wants to escape the penalty of the law by reason of the fact that the sales made were a matter of necessity it is for him to establish the same by proper evidence. In this he has totally failed. The evidence in this case does not even disclose that the articles sold were to be used on the day of purchase. In other words, so far as the evidence discloses, the articles could have been purchased the day before or a day later without working either any inconvenience or hardship to the purchaser.

The policy of the law seems to be to require our people to abstain from Sunday purchases, which it is claimed can be done, by laying in on Saturday supplies sufficient for Sunday. The effort to prove

that certain people must have a place to buy their groceries on Sunday, because they cannot buy on Saturday, is not convincing. But if all this were true it would not justify keeping the store open for the general "transaction of business," as charged in the affidavit.

It is not a necessity to buy anything on the first day of the week, which by the exercise of proper care might be purchased on the day previous. Sales to be a matter of necessity must be of things which reasonable foresight would not require you to purchase some other day, such as drugs and medicines.

If the plaintiff in error shall be permitted to keep his place of business open seven days in the week, then all like places of business should have the same privilege. We do not believe that anyone would claim such a condition to be a compliance with the Ohio law.

By agreement, the proprietors of stores in like business in the same community, or in the same sections of a city, often remain closed at certain times, as, for instance, on Saturday afternoons during July and August, that their employes may be freed for a time from the exacting duties of the week. If another merchant comes into that community to carry on the same business, he is not a party to the agreement, and is not bound to remain closed on Saturday afternoons in July and August; but if public sentiment is in favor of closing the same stores on Saturday afternoons, and the legislature moulds that public sentiment into a law, and by a legal statute provides that, "He who keeps open any building for the transaction of business on Saturday afternoons for the months of July and August of each year, shall on conviction be punished by fine or imprisonment," then the merchants who want to treat their clerks generously can do so, and at the same time protect themselves from unfair competition by enforcing the law. A law of this kind is exactly the same as the one prohibiting open stores on the first day of the week—both "being founded on principles of public policy alone."

I quote from Judge Thurman in *Bloom v. Richards*, 2 Ohio St. 387, as follows:

"The statute prohibiting common labor on the Sabbath, could not stand for a moment as the law of this state if the sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty. It is to be regarded as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day.

"It is not to be understood, that because a Sunday contract *may* be valid, therefore business may be transacted upon that as upon other days; as, for instance, by a merchant, not of the excepted class. To wait upon his customers and receive and sell his wares, is the common

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labor of a merchant, and there is a broad distinction between pursuing this avocation, and the case of a single sale out of the ordinary course of business."

It would have been an easy matter to have affirmed the judgment in this case without an opinion, but as I have before me a number of cases involving the same points, I have felt disposed to go fully into an interpretation of the statute, as I understand it, and to thoroughly examine the decisions of other courts on this and like statutes. This case, involving questions of law, as well as of fact, has given the court opportunity to make a more general review of the case than would otherwise be possible or proper.

This court has carefully examined the decisions of the courts of various states of the Union, and this opinion is in absolute harmony with the same. There is not a single decision to the contrary that has come to the attention of this court. Special attention has been given to the cases reported in *Bloom v. Richards*, *supra*; *Hale v. State*, 58 Ohio St. 676 [51 N. E. Rep. 154]; *Hamilton v. State*, 78 Ohio St. 76 [84 N. E. Rep. 601]; *Commonwealth v. Waldman*, 140 Pa. St. 89, 98 [21 Atl. Rep. 248; 11 L. R. A. 563]; *Commonwealth v. Crowley*, 145 Mass. 430 [14 N. E. Rep. 459].

The case of *Commonwealth v. Crowley*, *supra*, is strictly in point. Crowley was prosecuted under the statute making it an offense to keep open a shop "for the purpose of doing business therein, the same not being then and there works of necessity or charity." The defense was made under an amendment to the statute that exempted bakers for selling their own product during certain hours of the day. The defendant kept a shop for the purpose of selling groceries, fancy articles, bread, pastry and milk. He was found guilty, and the Supreme Court sustained the finding, holding that what was done was not a work of necessity, and in that case did not come under the exception. The court said to hold otherwise "would allow a large portion of the grocers and provision dealers of the commonwealth to open their shops on Sunday."

"We do not make the law; our duties are limited to interpreting it, and we feel ourselves bound by the construction which our predecessors have placed upon the act for nearly a century."

So it is, this court finds the law. If modern civilization requires the putting aside of these restraints, it can only be done by an appeal to the law making power. The courts cannot make the law. The province of the judge is to interpret the law as he finds it.

It is clearly established in the bill of exceptions that the plaintiff in error opened or caused to be opened his store for the transaction of business on November 10, 1907, which was the first day of the week,

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and the same, in no way, comes under either of the exceptions provided by the statute. The claim of the plaintiff in error that it was a work of necessity is not sustained by the evidence.

Judgment affirmed.

BONDS, EQUITY—MUNICIPAL CORPORATIONS.

[Superior Court of Cincinnati, June, 1909.]

CITIZENS NAT. BANK V. CINCINNATI.

1. "INADVERTENCE" OF OWNER OF BOND NOT "ACCIDENT" FOR WHICH EQUITY WILL ORDER REISSUE.

Accident attributable to one's own carelessness or neglect is not within the conception of the term for relief against which equity affords a remedy. Hence, a court of equity cannot compel a municipal corporation to substitute or reissue one of its bonds and coupons in place of one lost or misplaced through "inadvertence" of the purchaser thereof.

2. MUNICIPALITY CANNOT BE REQUIRED TO ASSUME INCREASED BURDEN OF CARING FOR INDEMNITY.

The increased burden imposed upon a municipality by the substitution or reissue of a lost municipal bond, of caring for and watching the indemnity given therefor through its ever changing officers, for a period of forty-six years, cannot justly be imposed by a court of equity, especially, since the owner admits its loss was caused through his own inadvertence and not through any fault of the municipality.

3. EQUITY CANNOT COMPEL MUNICIPALITY TO ACT BEYOND ITS POWERS.

The municipality having no power to reissue a lost municipal bond of a still outstanding issue, a court of equity has no power to decree a "renewal of the legal evidence of the debt" or "mandatory injunction" to compel the issuance of a substitute or a reissued bond.

[Syllabus approved by the court.]

DEMURRER to petition for injunction.

Paxton, Warrington & Seasingood, attorneys for plaintiff.

Adams Equity (8 ed.) 167; *New Orleans, J. & G. N. Ry. v. Mississippi College*, 47 Miss. 560; *Chesapeake & O. Canal Co. v. Blair*, 45 Md. 102; *Shugars v. Shugars*, 105 Md. 336 [66 Atl. Rep. 273]; *McMillan v. Edwards*, 75 N. C. 81; *Conlin v. Ryan*, 47 Cal. 71; *Church v. Stevens*, 56 Misc. 572 [107 N. Y. Supp. 310]; *Martin v. Piano & Organ Co.* 151 Ala. 289 [44 So. Rep. 112]; *Auditor v. Johnson*, 1 Hen. & M. (Va.) 536; *Rogan v. Watertown*, 30 Wis. 259; 2 Beach, Pub. Corp. 959, Sec. 928; *Newark v. Elliott*, 5 Ohio St. 114; *Craig v. Chicot Co.* 40 Ark. 233; *Mt. Vernon v. State*, 71 Ohio St. 428 [73 N. E. Rep. 515; 104 Am. St. Rep. 783]; *Portland Sav. Bank v. Evansville*, 25 Fed. Rep. 389; *Bank of Chillicothe v. Chillicothe*, 7 Ohio (pt. 2) 31 [30 Am. Dec. 185]; *United States v. New Orleans*, 98 U. S. 381 [25 L. Ed. 225].

Geoffrey Goldsmith, for the demurrer.

HOFFHEIMER, J.

Plaintiff, a national bank of Cincinnati, seeks the equitable intervention of this court, and asks that the court compel the defendants to issue to plaintiff a substitute bond in place of one alleged to have been misplaced by it.

In its petition it asserts ownership of a certain coupon bond issued and sold by the city of Cincinnati on June 1, 1905, in the sum of \$500, with interest at 3 1-2 per cent per annum, payable semiannually, in December and June of each succeeding year, the bond itself maturing in June, 1955. The bond was one of seven hundred of a similar issue, and was numbered 649. It was issued in accordance with ordinance 819, duly passed by the council of the city of Cincinnati, and it was duly signed by the mayor of the city. The bond and coupons are negotiable by delivery. It was purchased in the open market December 28, 1905, after one coupon had been paid. Before the arrival of the next interest-paying period, plaintiff "*through inadvertence had mislaid said bond*" (petition), and since then no coupons have been paid. At some time after the loss or misplacing of the bond, plaintiff requested of defendants a substitute or reissued bond, and it offered, upon such substitution or reissuance, to give the defendants proper indemnity. Defendants refused to comply with such request, and thereafter, on August 13, 1908, suit was brought in this court to compel defendants to substitute or reissue a bond of the value of the one alleged to have been lost, and incidentally judgment was asked for the coupons that had fallen due.

To this petition the defendants filed a joint and general demurrer, and the question presented to the court, stripped of all verbiage, is this: Has this court, sitting in chancery, the power, under the circumstances of this case, to compel defendants to substitute or reissue a bond in place of the one lost or misplaced, and if there is power resident in the court so to do, are the circumstances of this case such as warrant the exercise of the power?

The defendants, *arguendo*, contend that no relief should be afforded the plaintiff, because of *laches*; that plaintiff's remedy is at law, and not in equity; that while there may be relief in equity in *typical* cases of "accident," this is not such a case, because it presents points of difference, which will be noted in the course of the opinion.

Since plaintiff predicates its claim for relief on an instrument alleged to be owned by it and alleged to be lost or misplaced, the relief sought comes under the head of "accident," a head of equity that is "very ancient and coeval with the existence of equity itself."

Assuming that equity has jurisdiction to grant relief on the ground of accident, are the circumstances such as to warrant its exercise here?

Originally, before the equitable doctrines had been fully developed

and defined, the jurisdiction growing out of "accident" was understood to embrace every kind of accident in which an unexpected result had been produced by accident—in a word, every kind of misfortune was included. Lord Coke, 4 Inst. 84.

But Mr. Pomeroy, in his work on Equity Jurisprudence, directs attention to the error of Lord Coke (Sec. 825 and notes), and in formulating a definition to cover "accident," expresses an important limitation.

While the author confesses the difficulties that prevent an accurate definition, because of the essential elements to be considered, the difficulty that causes the courts generally to refrain from attempting any definition, nevertheless one thing is made *clear*, and that is, that the thing complained of as the "accident," must be an unforeseen and unexpected event, occurring external to the party *affected by it and of which his own agency is not the proximate cause*. (Italics the author's.)

In Smith's Manual of Eq. Jurisp. 36, it is stated that "accident is an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct."

Not only these definitions, but the cases hold that no relief is granted on the ground of accident where the alleged accident is the result of plaintiff's own fault or carelessness. (Pomeroy, Eq. Jurisp. Sec. 828, and cases cited.)

It appearing from the petition itself that the bond in question was lost through plaintiff's inadvertence, (synonymous with heedlessness, inattention, carelessness, Century Dictionary) equity would probably be very slow to say that the *misplacing of a bond through inadvertence* was an "accident."

But even where it appears that there was an accident as equity understands it, the jurisdiction in equity because of accident will not be exercised against a party who is equally entitled to protection with the one who seeks relief from the effects of accident. Pomeroy, Eq. Jurisp. Sec. 829.

In view of such principle, ought this court to relieve the plaintiff from the effects of what it is not clear is an accident, where it is manifest that to do so will work hardship and inconvenience to the other party?

The municipal bond here in question and its coupons being negotiable (*Clark v. Janesville*, 1 Biss. 98 [4 Am. L. Reg. 591; 5 Fed. Cas. 962]), is good as against the city in the hands of a subsequent *bona fide* taker for value before maturity. (*Elizabeth (City) v. Force*, 29 N. J. Eq. 287), and the city having been notified of the loss, it seems is not protected by the subsequent payment of coupons to one who does not show

himself a *bona fide* purchaser for value before maturity. *Bainbridge v. Louisville*, 83 Ky. 285 [4 Am. St. Rep. 153].

Throughout the life of this bond, therefore, that is, for a period of forty-six years, the city, through no fault of its own, but through plaintiff's *inadvertence*, has already the burden, in order to protect itself, of ascertaining whether the presenter of a coupon is a *bona fide* purchaser before maturity.

Considering this increased burden which defendant must now necessarily assume, and all without any fault on its part, and considering, further, the character of this defendant, that it is a municipal corporation with ever changing officers, the difficulties, because of such fact, that would necessarily lie in the way of caring for and watching the indemnity and of giving attention to its sufficiency during the ensuing forty-six years, it would seem to me, in view of the principle just referred to, that the situation is such as to justify the court in refusing relief, because of the ground upon which it is sought, to say nothing of the claim by defendant that plaintiff was further guilty of laches.

But if it appear that the court is *ultra-conservative* in this deduction, and if it can be said that plaintiff is not, for the reasons stated, disqualified from invoking the equitable intervention of this court, I am still unable to understand how this court, by a decree in equity, or by a mandatory injunction, can grant the relief asked and thereby compel these defendants to do an act which officially they are without power to do.

Counsel for the city, for the purpose of testing the applicability of mandatory injunction when invoked as against a municipality and its officers, likens the same (and the authorities show, very properly) to the legal writ of mandamus. 26 Cyc. Law & Proceed. 143, and cases cited.

And authorities are cited to show that the writ does not issue unless it appear that the party to be coerced had the *plain power* to do the act. *Brownsville (Comrs.) v. Loague*, 129 U. S. 493 [32 L. Ed. 780]. And that the act must be *ministerial* and not involve *discretion* and *judgment*. *United States v. Seaman*, 58 U. S. (17 How.) 225 [15 L. Ed. 226].

That these defendants as officials had no authority or plain power to do the thing requested would seem to follow, from an examination of the statutes which deal with the issuance of bonds, and from what this court has heretofore said in *Cincinnati v. Railway*, 16 Dec. 628 (4 N. S. 217), affirmed by the Supreme Court, *Louisville & N. Ry. v. Cincinnati*, 76 Ohio St. 481, that municipalities have only those powers which are *expressly* granted and those *necessarily implied* from *express*

grants; that all powers are strictly construed and all doubtful claims of power are resolved against the exercise of the power.

Examination of the various statutes which govern the city officials in the issuance of bonds, (see Ellis' Code, 3 ed., 274 to 302 inclusive) reveals no section by which express authority is conferred to substitute or reissue a bond, and I am unable to imply such power from the power to issue the original bond.

Cases which hold that the power is implied to take up a certain issue before maturity and reissue in its stead, are certainly not authority for reissuing or substituting a bond for an *outstanding, continuing primary obligation*.

Thus *Rogan v. Watertown*, 30 Wis. 259, Syl. 8, cited by plaintiff, is to be distinguished.

As said in 2 Beach, Pub. Corp. Sec. 928, "When the municipality has the power to issue bonds, and they have been issued, it may substitute other bonds of the same nature *in their stead*—may change the form but not the substance of its liability."

In other words, in those cases, the original power to issue bonds is not exhausted because the reissued bonds are in effect made in pursuance of the grant of power, the form of the obligation alone being changed. Consequently the power has not been exhausted. Here, however, there is no question of surrender of the original primary issue and of its cancellation. Indeed, the bond as originally issued by the city is *still outstanding* and is a *continuing primary liability*, and certainly as to it and the loan evidenced by it there has been a *complete exhaustion of power*.

The plaintiff contends, however, that the relief asked for does not concern itself with the exercise of municipal power, but that the question is, since the defendant may "sue and be sued," (Sec. 1536-100 Rev. Stat.), whether the city may be compelled, like any ordinary individual, and in the manner sought by plaintiff, to acknowledge its lawful obligation.

In other words, cannot this court, in the manner sought by plaintiff, "decree renewal of the legal evidence of the debt," which primarily was evidenced by the misplaced bond?

Conceding that the city may "sue and be sued," I take it, that this paragraph must have reference to some power which it has, either express or implied, and I fail to understand how that section can confer any *new power* on these defendants with reference to issuing bonds, and since there is no express or implied power by which these officials could voluntarily do what plaintiff now seeks to compel them to do, whether we term the relief, "a decreeing of renewal of the legal evidence of the debt," or "mandatory injunction" to compel the issuance

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of a substitute or a reissued bond, it would seem to me the result would still be the same, for in either event the court, by judicial decree, would be attempting to do an act smacking of the legislative in character, and tantamount to investing these officials with powers which, under the law, they have not.

It is this very lack of power in defendants, a municipal corporation, and municipal officers sitting in their official capacity, to voluntarily do what plaintiff asks this court to compel them to do, that distinguishes this case from what we may term the *typical* case in "accident," where the court's power is invoked to compel the doing of an act by private individuals which act the individuals could voluntarily have done; and it is this difference which renders it impossible for a court of equity to grant the relief sought, even if the occasion would seem to justify it.

Diligent search of the authorities fails to reveal a single direct precedent to sustain the contention of the plaintiff against a municipality or its officers.

Craig v. Chicot Co. 40 Ark. 233, cited by plaintiff, was an action at law, and the court, in interpreting the statute which conferred the power, interpreted the word "script" as including the word "warrants." In *Auditor v. Johnson*, 1 Hen. & Munf. (Va.) 536, what was said as to decreeing renewal of legal evidence seems to be mere *dictum*, and the case, which is an old one, appears to have been nowhere followed.

Rogan v. Watertown has already been distinguished, *supra*. And no other case cited by plaintiff affords this court any basis to indirectly confer any power on these defendants by "a decree to renew evidence in the manner prayed for," or by "mandatory injunction" to do a thing, which as officials these defendants have neither any express or implied authority in the law to do.

It is suggested by defendants that plaintiff is not without remedy at law; that it is amply protected on its chose and action, and that the law provides a method for perpetuating testimony.

But whether the law affords plaintiff a complete remedy, or not, or whether relief must be sought through a legislative enabling act, I do not now undertake to determine. What I do determine is, that, for the reasons given, this court cannot entertain the action, and that there is no power resident in this court to grant the primary relief sought, and that, consequently, there can be no judgment on the coupons due, which is the incidental relief sought.

The demurrers are accordingly sustained and the petition dismissed.

Railway v. Commission.

INTERSTATE COMMERCE.

[Franklin Common Pleas, April, 1909.]

- ANN ARBOR RY. ET AL. V. RAILROAD COMMISSION OF OHIO.

1. STATE IS WITHOUT AUTHORITY TO REGULATE CAR SERVICE INTERSTATE COMMERCE ON INTERSTATE RAILWAYS.

The state has the right to the service of interstate railways in intrastate commerce and through its railway commission may make reasonable rules regulating intrastate service thereon; but it has no power to restrict interstate shipments over interstate commerce railways by car service rules, as such regulations are within the exclusive province of the federal authorities.

2. PUBLIC RATHER THAN LOCAL INTEREST CONTROLS REGULATIONS AS TO USE OF RAILWAY CARS.

The interest of the general shipping public, which demands the greatest possible dispatch in the movement of cars engaged in interstate commerce, rather than the convenience of local shippers, is the controlling principle to be applied in the determination of what are reasonable regulations as to demurrage charges and free time to consignees unloading cars.

3. DEMURRAGE CHARGES CANNOT BE IMPOSED ON INTERSTATE COMMERCE BY STATE AUTHORITIES.

Demurrage charges, as respects matters of interstate commerce, are within the control of the interstate commerce commission, the state railway commission having no power to impose such charges on interstate commerce.

[Syllabus approved by the court.]

DEMURRER to petition.

J. F. Wilson, C. O. Hunter, Edward Colston, T. W. Reath, F. A. Durban, Squires, Sanders & Dempsey, for plaintiffs.

U. G. Denman, Atty. Gen., O. E. Harrison and J. R. Horst, for defendants:

The power of the state to legislate with respect to its internal affairs; this includes the power to regulate a multitude of things incidental to interstate commerce and connected therewith. It has such authority by virtue of its police power. *Cooley v. Philadelphia (Bd. of Wardens)*, 53 U. S. (12 How.) 299 [13 L. Ed. 996]; *Mobile Co. v. Kimball*, 102 U. S. 691 [26 L. Ed. 238]; *Louisville & N. Ry. v. Kentucky*, 161 U. S. 677 [16 Sup. Ct. Rep. 714; 40 L. Ed. 849]; *Erb v. Morasch*, 177 U. S. 584 [20 Sup. Ct. Rep. 819; 44 L. Ed. 897]; *Chicago, B. & Q. Ry. v. Iowa*, 94 U. S. 155 [24 L. Ed. 94]; *Hennington v. Georgia*, 163 U. S. 299 [16 Sup. Ct. Rep. 1086; 41 L. Ed. 166]; *Pennsylvania Ry. v. Hughes*, 191 U. S. 477 [24 Sup. Ct. Rep. 132; 48 L. Ed.

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268]; *Richmond & A. Ry. v. Tobacco Co.* 169 U. S. 311 [18 Sup. Ct. Rep. 335; 42 L. Ed. 759]; *Wisconsin, M. & P. Ry. v. Jacobson*, 179 U. S. 287 [21 Sup. Ct. Rep. 115; 45 L. Ed. 194]; *Chicago, M. & St. P. Ry. v. Solan*, 169 U. S. 133 [18 Sup. Ct. Rep. 289; 42 L. Ed. 688]; *Cleveland, C. C. & St. L. Ry. v. Illinois*, 177 U. S. 514 [20 Sup. Ct. Rep. 722; 44 L. Ed. 868]; *Hooper v. California*, 155 U. S. 648 [15 Sup. Ct. Rep. 207; 39 L. Ed. 297]; *Williams v. Fears*, 179 U. S. 270 [21 Sup. Ct. Rep. 128; 45 L. Ed. 186]; *New York v. Knight*, 192 U. S. 21 [24 Sup. Ct. Rep. 202; 48 L. Ed. 325]; *Hopkins v. United States*, 171 U. S. 578 [19 Sup. Ct. Rep. 40; 43 L. Ed. 290]; *Bagg v. Railway*, 109 N. C. 279 [14 S. E. Rep. 79; 14 L. R. A. 596; 26 Am. St. Rep. 569].

The railroad commission of Ohio is a body authorized by law to regulate railroads within the state. This includes the power to make regulations affecting both intrastate and interstate carriers. While it cannot regulate interstate commerce it may make orders affecting interstate carriers and control local services, although such services may be connected with interstate commerce. *Stone v. Loan & Trust Co.* 116 U. S. 307 [6 Sup. Ct. Rep. 334; 29 L. Ed. 636]; *State v. Terminal Co.* 41 Fla. 377 [27 So. Rep. 225]; *Stone v. Railway*, 62 Miss. 607 [52 Am. Rep. 193]; *Chicago, B. & Q. Ry. v. Dey*, 38 Fed. Rep. 656; *State v. Railway*, 40 Minn. 353 [42 N. W. Rep. 21]; *Minneapolis & St. L. Ry. v. Railroad & Warehouse Com.* 44 Minn. 336 [46 N. W. Rep. 559]; *Railroad Commissioners v. Railway & Nav. Co.* 17 Ore. 65 [19 Pac. Rep. 702; 2 L. R. A. 195]; *State v. Railway*, 86 Iowa 641 [53 N. W. Rep. 323]; *New London North. Ry. v. Railway*, 102 Mass. 386; *State v. Railway*, 22 Neb. 313 [35 N. W. Rep. 118]; *People v. Railway*, 104 N. Y. 58 [9 N. E. Rep. 556; 58 Am. Rep. 484]; *Burlington, C. R. & N. Ry. v. Dey*, 82 Iowa 312 [48 N. W. Rep. 98; 12 L. R. A. 436; 31 Am. St. Rep. 477]; *Chicago, B. & Q. Ry. v. Jones*, 149 Ill. 361 [37 N. E. Rep. 247; 24 L. R. A. 141; 41 Am. St. Rep. 278]; *Chicago, B. & Q. Ry. v. Iowa*, 94 U. S. 155 [24 L. Ed. 94]; *Ruggles v. Illinois*, 108 U. S. 526 [2 Sup. Ct. Rep. 832; 27 L. Ed. 812]; *Stone v. Railway*, 116 U. S. 352 [6 Sup. Ct. Rep. 349; 29 L. Ed. 651]; *Chicago & N. W. Ry. v. Dey*, 35 Fed. Rep. 866; *McWhorter v. Railway*, 24 Fla. 417 [5 So. Rep. 129; 2 L. R. A. 504; 12 Am. St. Rep. 220]; *Storrs v. Railway*, 29 Fla. 617 [11 So. Rep. 226]; *State v. Railway*, 38 Minn. 281 [37 N. W. Rep. 782]; *Pacific Coast Steamship Co. v. Railroad Commissioners*, 18 Fed. Rep. 10; *Southern Pac. Co. v. Railroad Commissioners*, 78 Fed. Rep. 236; *State v. Railway*, 19 Neb. 476 [27 N. W. Rep. 434]; *Railroad Commissioners v. Railway*, 63 Me. 269 [18 Am. Rep. 208]; *State v. Railway*, 87 Iowa 644 [54 N. W. Rep. 461]; *Westbrook's Appeal*, 57 Conn. 95 [17 Atl. Rep. 368]; *Fairfield's Appeal*, 57 Conn. 167 [17 Atl. Rep. 764]; *Union Terminal Ry. v. Railroad*

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Commissioners, 54 Kans. 352 [38 Pac. Rep. 290]; *New York, L. etc. Ry. In re*, 35 Hun (N. Y.) 232; *State v. Railway*, 104 Ga. 437 [30 S. E. Rep. 891]; *Jacobson v. Railway*, 71 Minn. 519 [74 N. W. Rep. 893; 40 L. R. A. 389; 70 Am. St. Rep. 358]; *Chicago, M. & St. P. Ry. v. Becker*, 32 Fed. Rep. 849; *Charlotte, C. & A. Ry. v. Gibbs*, 142 U. S. 386 [12 Sup. Ct. Rep. 255; 35 L. Ed. 1051]; *Reagan v. Loan & Tr. Co.* 154 U. S. 362 [14 Sup. Ct. Rep. 1047; 38 L. Ed. 1014].

Demurrage is not interstate commerce. It is a local charge, independently paid for, and is not a part of the published tariff rate. *Coe v. Errol*, 116 U. S. 517 [6 Sup. Ct. Rep. 475; 29 L. Ed. 715]; *Interstate Commerce Commission v. Railway*, 167 U. S. 633 [17 Sup. Ct. Rep. 986; 42 L. Ed. 306]; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82 [23 Sup. Ct. Rep. 266; 47 L. Ed. 394]; *Gulf, C. & S. F. Ry. v. Texas*, 204 U. S. 403 [27 Sup. Ct. Rep. 360; 51 L. Ed. 540]; *The Daniel Ball*, 77 U. S. (10 Wall.) 557 [19 L. Ed. 999]; *Kelley v. Rhoads*, 188 U. S. 1 [23 Sup. Ct. Rep. 259; 47 L. Ed. 359]; *Brown v. Houston*, 114 U. S. 622 [5 Sup. Ct. Rep. 1091; 29 L. Ed. 257]; *United States v. Boyer*, 85 Fed. Rep. 425; *Atlantic Coast Line Ry. v. Corporation Commission*, 206 U. S. 1 [27 Sup. Ct. Rep. 585; 51 L. Ed. 933].

Even if the interstate commerce act can be construed to give the interstate commerce commission authority to make car service rules, said commission has not acted with relation thereto, and the power has not been withdrawn from the state. *Missouri Pac. Ry. v. Flour Mills Co.* 29 Sup. Ct. Rep. 214.

KINKEAD, J.

The questions arise upon demurrer to the second cause of action.

Plaintiffs (thirty-five railroads), for their second cause of action aver that the defendant commission on March 20, 1908, made an order determining and fixing certain car service charges, regulations and practices, to be imposed, observed and followed in the future by all the plaintiff railroad companies.

The petition thereupon sets forth each and all of the rules so made, and now complained of.

Without enumeration or going into details, it may be stated that the only question urged in argument, relates to car service regulations, objection being made by plaintiffs to rules allowing forty-eight hours free time for cars containing sixty-six thousand pounds, and seventy-two hours for cars containing more than sixty-six thousand pounds. Objection is made also to other allowances and increases of free time for car service.

It is claimed that Rules 1, 2, 6, 12 and 14 are applicable to cars in transit; that the remainder of the rules relate to the receipt and

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delivery of property at the commencement and end of the carriage; that is, they regulate the free time which shall be allowed for the loading and unloading of cars, the charges which may be made for overdetention for such purposes, and the method of calculating such charges.

It is claimed that the receipt and delivery of property for interstate transportation, and the detention of cars for that purpose, is a part of the interstate commerce therein.

It is claimed that the delivery of cars to a shipper for loading of freight which is to be transported by the carrier from the place where the same is loaded to another state, is as much a part of interstate carriage as when the car and its contents are in transit.

The same claim is made in respect to freight delivered in cars in public or private loading places to be unloaded by the consignee; that interstate commerce does not end until the consignee has unloaded and relinquished the car.

It is conceded that the railroad commission has power simply to regulate intrastate commerce, but it is contended that it has, by the rules complained of, directly and immediately regulated interstate commerce.

It will readily be conceded that the cars of the plaintiff carriers are used indiscriminately in state and interstate transportation.

This being true, it is plain that if the rules apply and govern the use of all cars whether in state or interstate commerce, their detention indiscriminately according to the provisions of these rules, will constitute a restriction upon interstate commerce.

The rules in question which authorize the detention by consignees and consignors for the periods prescribed for interstate shipments, constitute a direct infringement of the constitutional right of congress to regulate commerce, as well as a violation of the interstate commerce act, provided such interstate commerce begins when the car is delivered to the consignor for loading, and ends only when the same is unloaded by the consignee.

But the claim of the railroad companies is carried further than this, however. It is argued that the detention of cars for purposes of state commerce, has an indirect effect upon interstate commerce, because the total volume of available equipment is diminished by such detention, and the railroad affected, therefore, has fewer available cars for both state and interstate business, than it would have if such detention were not permitted or were permitted for only a shorter time.

It is apparent, therefore, that if the contention of the railroad company be the correct and sound position, and interstate commerce does begin when the cars are placed at the disposal of the shipper by the company for loading, then the prevailing rule which has existed for

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so long, which does not impose the responsibility of the carrier, as such, until the car is loaded and the bill of lading is delivered to the shipper, will necessarily be ignored.

To reach the conclusion that interstate commerce begins when the car is delivered to the shipper, there must be some very potent and sound reasons for creating an exception to the familiar and long prevailing rule referred to.

If it is to be decided that interstate commerce does not *end* until the consignee has entirely unloaded the car, and thus relinquished it, in reliance upon the ordinary rule fixing the responsibility of the carrier, it might be urged that the same theory or principle should control in determining when interstate commerce *begins*.

The application of such a doctrine would result in one rule regulating the commencement of interstate commerce, and another the time of its completion.

The conditions and equitable adjustment of the rights of shipper, consignee and carrier in matters of liability for loss and responsibility therefor, have no relation or bearing upon the broad and comprehensive question, of interstate commerce involved in determining the most advantageous methods of use and manipulations of the immense equipment of the railroad systems, and the consequent rules of law which shall be formulated to produce the best results, and to promote and foster interstate commerce between the states.

It is a well known fact that in this modern age, the greatest per cent of supplies for nearly every want, is chiefly carried by means of interstate commerce shipments, either by way of importation or exportation. Almost everything we eat, for example, comes from other states by means of interstate railroads. And many other things might be enumerated to show the magnitude and importance of the function of the great arteries of interstate commerce in the service of the people of the states. We must have in mind the convenience not only of the citizenship of one state, but of all.

The railroad in the state which does not engage in interstate commerce to some extent would be difficult to find.

A striking example of the abuses that may result from the enforcement of such rules as the railroad commission has enacted is well illustrated in *Wilson Produce Co. v. Railway*, 14 Inter. Com. Com. 170, hereinafter cited, where the consignees of car load shipments of southern products used the cars from which to display their goods and sell them, converting the instruments of interstate commerce into local warehouses, to the disadvantage of shippers. The rules complained of extending the free time would tend to foster such abuses.

Those who have been giving special attention to freight car ma-

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nipulation are alive to the situation. It is conceded on all hands that there ought to be proper regulation by competent authority to correct abuses on the part of railroad or shipper. The criticism of the association of railroad commissioners is of interest. Their report reads:

"It is to the interest of shippers that many concessions made by the railroads in the way of free time for cars should be withdrawn. The individual shipper who succeeds in using a coal car as a warehouse for ten or fifteen days free of charge may profit thereby, but he does so at the expense of other shippers who are entitled to have the use of the car for transportation of their coal. The pressure of the individual shippers to secure additional free time is really directed against the proper use of cars and against the best interests of the shipping public as a whole. Some state authorities have yielded to this pressure of shippers and by so doing have complicated the transportation problem for shippers of other states. One New England state, for instance, has provided for four days free time for the loading and unloading of cars. This is double a reasonable allowance and is gained by the shippers of this state at the expense of the car supply of the entire country.

"A middle western state (Ohio), through its railroad commission during the past year, has increased the free time and introduced various rules in favor of particular classes of receivers of freight. The net result is that cars in that state are most largely used for warehouses."

This is an important expression of opinion on the wisdom and policy of such rules as are under test. It is the unanimous opinion of the national convention of railroad commissioners of the different states, held October 8, 1908. It was participated in by an Ohio member who apologized for the rules, and he being present, the report was unanimously adopted.

All such detentions of cars to serve the mere local convenience of shippers or consignee tends to retard and clog the general service of the railroads.

The opinion expressed by the same body, likewise entitled to much weight, is, that the public interest requires that car service rules should be uniform throughout the country. Four days' time in one state serves to give an advantage to the shippers of that state, at the expense of other shippers. Cars withheld by shippers in one state interfere with shippers in another state.

This evidence, coming from railroad commissioners experienced and familiar with conditions, is evidence that the demand for free time comes from the selfish interests of the shippers, and that the general

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good is thereby lost sight of. It must be observed that the commissioners are *quasi-judicial* officers.

The controlling principle leading the court to the conclusion that the rules in question are designed in effect to restrict interstate commerce, is that the interest of the general shipping public demands the very greatest dispatch possible.

The local regulation of this matter being prompted by the demands of shippers for more free time turns the mind towards uniformity of regulation which can best be secured by national regulation by virtue of the interstate commerce clause, and the laws passed by congress in pursuance thereof.

We look to the interest of the general shipping public; not necessarily to that of the railroads. The latter are the servants of the people, who want and have the right to demand of them prompt and efficient service.

That the railroads are the servants, and the people their master, is demonstrated by the creation of railroad commissions, and the interstate commerce commission, which have supervisory control over them.

It is highly important that the powers of each of these bodies be well defined to avoid conflict and confusion.

It has been suggested that there should not be a division of authority over what is practically one mass of equipment; that the entire body of railroad equipment is part of practically one system of transportation. That the body of freight car equipment being practically a unit, the system of rules governing its use should be free from conflict.

It seems from the foregoing considerations that the decision of this question, vastly more important than mere local convenience of local shippers, must ignore the personal or individual interest, as well as the ordinary rule of law applicable to receipt and delivery of freight, and the rules arising therefrom, fixing the rights and responsibility of shipper and carrier.

The constitutional framework of the federal government was built so as to permit expansion and growth. In the great march of progress we look back at the work of our forefathers in the construction of the constitution with astonishment. The interstate commerce clause has been more useful as business expands, and state lines do not have so much meaning as formerly.

True, there is strong opposition to such a theory, but we cannot fail to see that the greater bulk of our commerce is interstate.

Looking at the problem squarely, it seems entirely clear that the interstate commerce clause of the federal constitution embraces not only the contract between the shipper in the one state and the consignee in

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the other, but the railroad company as the medium between the two, all three of which parties are engaged in the business of interstate commerce, and their conduct and contract are subject to federal regulation. But the chief responsibility and the greatest demand is upon the carrier, as without it there would be no interstate commerce, so that all of its conduct and acts having to do with interstate commerce, are subject to the control of congress. The contract which the carrier makes to furnish cars to shipper, or to grant the use thereof in case of interstate commerce shipment, to the consignee, is subject to control of congress. As the contract to ship and the regulation of the use of its cars and equipment are one and the same thing, it follows that the duties and conduct of the carrier in such matters in all shipments from a consignor in one state to a consignee in another, as well as the rights which exist between the carrier and consignee in the use of the cars and equipment of the road, fall within congressional regulation and not within state control. These statements are intended to apply to interstate and not intrastate business. Congress having committed such matters to the interstate commerce commission, that body has the exclusive power to regulate such matters and not the state through its railroad commission.

Directing attention to the claim of counsel for the commission, that demurrage is a local charge, independently paid for, and is not a part of the published tariff rate, the reasons already advanced may be a sufficient answer.

The fact is, however, that congress in obedience to the constitutional mandate touching interstate commerce, has already spoken. It has created the interstate commerce commission and clothed it with certain powers. In pursuance thereof the commission has provided (Regulations Int. Com. Com. 16, Sec. 10) that:

“Each carrier shall publish * * * and file separate tariffs, which shall contain in clear, plain and specific form and terms all the terminal charges and all allowances, such as arbitraries, switching, * * * transit privileges, and car service, together with all other privileges, charges and rules which in any way increase or decrease the amount to be paid on any shipment.”

But it is said by counsel that even if the interstate commerce act can be construed to give the interstate commerce commission authority to make car service rules, the commission has not acted in relation thereto and the power has not been withdrawn from the state. But congress has acted and the commission is acting in pursuance thereof. Looking to the regulations of the commission, if this may properly be done now, it would seem that the regulations by the commission require railroads

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engaged in interstate commerce to publish car service tariffs. And this, it appears, is being done by the railroads.

Special stress is laid upon the claim that the rules in question operate rather upon the *instruments of commerce*; that the cars are mere instruments of commerce and not necessarily part of commerce itself, and therefore the regulation by the state railroad commission touching demurrage for car service, is a mere regulation of the use of instruments of commerce and not of interstate commerce.

In support of this position adjudications by the federal courts are offered for consideration in this connection.

For instance, in *Louisville & Nashville Ry. v. Kentucky*, 161 U. S. 677 [16 Sup. Ct. Rep. 714; 40 L. Ed. 848], the Supreme Court by Mr. Justice Brown, in discussing a question of state regulation within the province of police regulation, said, page 702:

"It has never been supposed that the dominant power of congress over interstate commerce took from the states the power of legislation with respect to the instruments of commerce, so far as the legislation was within its ordinary police powers. * * * In the division of authority with respect to interstate railways congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

All regulations by states coming within such a rule and being within the police regulation are consistent with the position taken by the court in this case. Regulation has been made by the states of rates of speed, the prohibition of the running of freight trains on Sunday, promoting the safety and comfort of passengers, employes, and the like. Prescribing the rates of fare has been undertaken and sustained by some state courts. But this regulation is not mentioned as one of the police regulations.

The regulations named have been sustained as not infringing upon interstate commerce, but rather in aid thereof.

A sufficient answer to the point made as to the regulation of the instruments of commerce is to be found in the interstate commerce act. It is made to apply to "any common carrier or carriers engaged in the *transportation* of passengers or *property* wholly by railroad * * * from one state * * * of the United States * * * to any other state," etc.

It then defines "transportation."

"And the term '*transportation*' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the

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use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, etc.; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. * *

* And shall furnish cars for the movement of such traffic to the best of its ability without discrimination, etc. * * * And shall file with the commission * * * and print and keep open to public inspection schedules showing all the rates, fares, and charges. * * * The schedule shall plainly state * * * all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered the passenger, shipper or consignee."

This act shows a distinct purpose to assume control or supervision of the transportation facilities, and all charges legitimately connected with and a part of the interstate shipment.

This court will be content with the expression of its own reasons for the conclusions reached, and will not undertake to enter into an extended discussion of the federal authorities cited by counsel for defendant. It is sufficient to state that so often general expressions may be gathered from decisions which separated from the facts of the particular case would seem to apply to another situation. In answer to the federal citations of counsel for the commission, the statement of the Supreme Court made in *Wabash Ry. v. Illinois*, 118 U. S. 557 [7 Sup. Ct. Rep. 4; 30 L. Ed. 244], may be sufficient, viz.:

"Notwithstanding what is there said, this court holds now, and has never consciously held otherwise, that a statute of a state, intended to regulate or to tax, or to impose any other restriction upon the transmission of persons, or property or telegraphic messages, from one state to another, is not within that class of legislation which the states may enact in the absence of legislation by congress; and that statutes are void even as to that part of such transmission which may be within the state."

This statute seems to place the entire body of freight car equipment of interstate roads within the control of the interstate commerce commission. This body has been exercising the power of regulating the car service. On March 16, 1908, it held that questions of demurrage and car service on interstate shipments are within the jurisdiction of the interstate commerce commission, and did not concur in the view that such matters, even when pertaining to interstate shipments, are within the control of state commissions.

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In *Wilson Produce Co. v. Railway*, No. 1472, decided June 24, 1908, 14 Inter. Com. Com. 170, it held that:

"The duty of regulating terminal charges, when relating to traffic between the states, has been lodged with the interstate commerce commission. A state statute fixing terminal charges is not controlling with respect to interstate transportation."

In this case the complainants were dealers in fruit in Pittsburgh. About 85 per cent of the produce was sold from the cars, using them as warehouses. The yard became congested, which was largely due to the custom of retaining cars in order to make sales or to await a favorable market.

Commodities were even moved from one car to another for exhibition.

Lane, Commissioner, said:

"Track storage charges where associated with an interstate movement appertain directly to interstate commerce. They represent the carriers' compensation for services rendered in connection with the transportation. A shipment is not completed until arrived at destination and delivery to the consignee; and the authority vested in congress by the commerce clause of the constitution covers everything related to the delivery of freight between the states.

"In the case of *Interstate Com. Com. v. Railway*, 167 U. S. 633 [17 Sup. Ct. Rep. 986; 42 L. Ed. 306], the Supreme Court suggested that the commission would be acting within its powers if it should order that the railway companies should regard cartage, when furnished free, as a terminal charge and include it in their schedules.

"If cartage charges may be regarded as a proper subject for national regulation, federal authority over demurrage and track storage charges in connection with interstate commerce cannot be challenged.

"We think we may go further and hold that the federal authority in this field is exclusive. It is well settled that in the absence of congressional action the states may legislate with respect to matters which are strictly local in character, even though in so doing they may to some extent regulate interstate commerce; but, as said by the Supreme Court in *Cooley v. Philadelphia (Bd. of Wardens)*, 53 U. S. (12 How.) 299 [13 L. Ed. 996], 'Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress.'

"The question of terminal charges imposed in connection with interstate transportation would seem to be within the scope of this principle. The subject is national in character, and uniformity of legislation is essential. If the individual states were permitted to legislate

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in this field, endless confusion and discrimination would be the result. Such regulation would operate as a direct burden upon interstate commerce, and the supreme court has repeatedly refused to sustain laws which had this effect. But it is unnecessary to decide that the federal authority over this subject is exclusive, inasmuch as congress has taken definite action and removed the subject altogether from the field of state regulation. The first section of the act to regulate commerce, after outlining the scope of the commission's jurisdiction, defines transportation."

The opinion then sets forth the paragraph of the law which has been heretofore quoted.

Then, proceeding, the commission says:

"Power of congress to act with reference to this subject is indisputable; that congress has made provisions for the regulation for these charges is just as clear; and it follows necessarily that a state law which conflicts with the federal statutes must give way."

One federal lower court decision is cited in support of the plaintiffs, which supports their contention.

In *Michie v. Railway*, 151 Fed. Rep. 694, it was held that demurrage or car service charge made by an interstate railroad company for the time during which cars loaded with hay are left standing on its tracks at a suburban station in Boston after the expiration is within the meaning of interstate commerce, etc.

The court said in the course of its opinion:

"Practically all the charges here in question are made to compensate the railroad for the use of its cars and tracks beyond that reasonable period during which a railroad must allow the consignee to come and get his goods without charge. A railroad is not obliged to permit the use of its cars for storage. It may require consignees to remove their goods at once, but for its own profit and for public convenience the use is permitted, and compensation therefor is exacted. The railroad directly, and indirectly the public, are benefited by a speedy release of cars, and their speedy return into circulation. This obvious fact is emphasized by the conditions which now exist throughout the United States. The time allowance for delivery at Forest Hills is reasonable, and the court has already held that the charge made for car service there is reasonable also. The railroad is not bound to build a hay shed at Forest Hills or at its stations generally. At its terminal in the great city of Boston it has done so, and there it gives facilities for storage which are not given at Forest Hills or elsewhere on the line."

In *Rhodes v. State*, 170 U. S. 412 [18 Sup. Ct. Rep. 664; 42 L. Ed. 1088], in construing a statute of Iowa in connection with a shipment of

liquor from Dallas, Ill., destined to Burlington, Iowa, the supreme court said :

“That this Iowa statute cannot be held to apply to a box of spirituous liquors, shipped by rail from a point in Illinois to a citizen of Iowa at his residence in that state while in transit from its point of shipment to its delivery to the consignee, without causing the Iowa law to be repugnant to the constitution of the United States.

“Moving such goods in the station from the platform, on which they are put on arrival to the freight warehouse is a part of interstate commerce.”

The case of *Coe v. Errol*, 116 U. S. 517-519 [6 Sup. Ct. Rep. 475; 29 L. Ed. 517], appears among the authorities cited for consideration. There the question was as to what period of time goods prepared for exportation to another state and partially prepared for that purpose by being deposited at a place or port of shipment within the state, were freed from local taxation.

The court observed that there must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed by the national law; that they are not in process of exportation, nor is exportation begun until they are committed to the carrier for transportation out of the state.

This might have some bearing upon the question but for the provision of the interstate commerce act. Interstate *transportation* within the meaning of that act has begun when the shipper has called for and had the car delivered to him for loading. That is true because the act provides that transportation includes cars and all services in connection with the receipt, delivery, etc. And the act, as before stated, requires the interstate roads to file and publish the tariff lists for such services. And the submissions upon the demurrer show that this has actually been done.

Counsel for plaintiffs urge the claim that even the enforcement of the rules in question in *intrastate* commerce will operate upon as an interference with *interstate* commerce. That is perhaps true; increasing free time for the use of cars, when used for service within the state, would have precisely the same effect so far as retarding the progress of the cars as if increased for interstate service. The railroad equipment being a part of one system of transportation, a different rule as to free time for car service from that in interstate would create confusion. If greater time be allowed in domestic service than in national, the supply of cars would be interfered with.

But there seems to be absolutely no way of avoiding such a result. The state may make reasonable rules regulating *intrastate* service, and

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if they prove burdensome to *interstate* commerce, there would seem to be no remedy.

The state has the right to the service of interstate railway systems in *intrastate* commerce. Having that right it may also regulate its exercise without fear or hindrance of national interference.

The rules in question are considered invalid only so far as they are made to apply to interstate shipments in the *transportation* by interstate commerce railroads, as defined in the interstate commerce act, and in the manner pointed out in this opinion.

Without further particularization (unless counsel think it necessary) of the rules drawn in question, the demurrer to the second cause of action is overruled for the reasons stated.

PRINCIPAL AND AGENT—PROCESS.

[Harrison Common Pleas, December, 1908.]

SAMUEL BIGGER v. STATE LIFE INS. CO. OF WORCESTER, MASS., ET AL.

1. CONTRACT BY ONE DESCRIBED AS "GENERAL AGENT" HELD HIS INDIVIDUAL CONTRACT.

A contract of employment between a party of the first part, designating himself as "general agent" of a life insurance company named, appointing a party of the second part "agent," to "act exclusively for," to keep "statements of all transactions for account of," transmit each month "a report in detail to," etc., to be allowed a commission to be paid by, "said general agent," nowhere stating that the insurance company is liable and signed by the parties thereto, the name of the one followed by the description "general agent" and the other by "agent" is a contract with such general agent acting in his individual capacity and not one upon which the company is jointly liable for breach thereof.

2. SERVICE OF SUMMONS UPON AGENT OF INSURANCE COMPANY FOR DAMAGES AGAINST BOTH JOINTLY FOR BREACH OF HIS INDIVIDUAL CONTRACT CONFERS NO JURISDICTION.

Service of summons upon a life insurance company conformably to Sec. 5035 Rev. Stat. does not authorize issuance and service of summons to the general agent of such company in another county, in an action for damages against both jointly upon a contract made by such general agent in his individual capacity but not binding upon the company; and service upon such general agent in the county of his residence does not give a court in the county in which suit is brought jurisdiction over him.

[Syllabus approved by the court.]

W. M. Bigger and D. A. Hollingsworth, for plaintiff.

R. M. Calfee, for defendants:

Cited and commented upon the following authorities: *Dunn v. Hazlett*, 4 Ohio St. 435; *Smith v. Johnson*, 57 Ohio St. 486 [49 N. E. Rep. 693]; *Fostoria v. Fox*, 60 Ohio St. 340 [54 N. E. Rep. 370]; *Drea v. Carrington*, 32 Ohio St. 595; *Foster v. Borne*, 63 Ohio St. 169 [58 N. E. Rep. 66]; *Union Casualty & Sur. Co. v. Gray*, 114 Fed. Rep. 422; *Smith v. Hoover*, 39 Ohio St. 249; *Elliott v. Lawhead*, 43 Ohio St. 171 [1 N. E. Rep. 577].

SHOTWELL, J.

This case is submitted on a motion on behalf of Hubert H. Ward, one of the defendants, to dismiss for want of jurisdiction.

The suit is brought to recover \$10,000 damages, which the plaintiff alleges that he has sustained by reason of his wrongful discharge as an agent of the defendants.

The defendants are the insurance company and Hubert H. Ward. The defendant insurance company is served as the statute provides and the court acquires jurisdiction, under that statute, in this county.

A summons for Hubert H. Ward was issued to Cuyahoga county and served there. It is now claimed that Hubert H. Ward could not be compelled to answer to an action in this county, unless he is jointly liable with the defendant insurance company, which is rightly served in this county.

Section 5035 Rev. Stat. provides, that when an action is rightly brought in any county, a summons may issue to another county against a defendant who is jointly liable with the one rightly served in this county. So that if Hubert H. Ward is to be held as a defendant here, he must be shown by the petition to be jointly liable with this insurance company. If the insurance company is not liable in this county, then Hubert H. Ward cannot be held in this county.

The question therefore is, under this pleading, whether or not this suit is rightly brought against the insurance company. The petition is very general upon the question as to whether or not these parties are jointly liable. It is alleged that the plaintiff was employed to perform such duties as might be required of him by the general agent. It is further alleged, that in consideration of the services rendered defendants by the plaintiff under this contract, he was to be paid thus and so, and it is further alleged that he was to receive certain commissions so long as he remained connected with this general agency.

Now these are substantially all of the allegations that would make these two defendants jointly liable to him, except the further allegation that these defendants wrongfully discharged him and refused to permit him to do this work.

But now what was the character of his employment? The contract of employment is alleged by this petition to have been altogether in writing, and is contained in three separate exhibits attached to the petition and all of them made a part of it. So that whether or not these parties are jointly liable is to be determined not only from the body of the petition itself, but from the exhibits that are attached to it; for these exhibits are every one of them made a part of the petition,

and therefore in considering the petition they must all be construed together—the petition itself and the three exhibits in connection with it. All of the contracts appear in the exhibits and the petition only states conclusions that are drawn from those exhibits; hence the whole contract so far as it concerns these three parties is to be found in these three exhibits.

What do these three exhibits show? Exhibit "A" is the first contract of employment that was made, and this contract is made between Hubert H. Ward, general agent of the State Mutual Life Insurance Company of Worcester, Massachusetts, party of the first part, and Samuel Bigger, of Smithfield, in the county of Jefferson and state of Ohio, party of the second part. Now notice that this contract states that it is a contract between Hubert H. Ward, who is described as the general agent of this company, but the contract is none the less between that Hubert H. Ward and this Samuel Bigger. Then it says that, "said party of the first part doth hereby appoint the said party of the second part." That is, it constitutes Bigger the agent of Ward. Then it stipulates that:

"The said agent shall act exclusively for said general agent, so far as to tender all risks obtained by him, or under his control, to said general agent.

"2nd. The said agent shall keep regular and accurate statements of all transactions for account of said general agent, and shall on or before the twentieth day of each month transmit to said general agent a report in detail."

And further, he is to keep all books of account, registers, etc., to be the exclusive property of said general agent and open to his inspection, and he is to remit in accordance with instructions received from said general agent, and he has no authority to make contracts different from those that are permitted by this general agent, not to contract any debt rendering the general agent liable, and to be allowed a commission, which is to be collected and paid over by the general agent. He is to give bond, and that bond is to be deposited with the general agent, and he is to make reports to the general agent and devote his entire time to the business in hand.

When we come to the signatures to the contract we find that it is signed "Hubert H. Ward, general agent," and "Samuel Bigger, agent." They are both described as agents.

Now when we come to exhibit "B," which is shorter, it is a modification of exhibit "A," but it is the same contract exactly between Hubert H. Ward, who is described as "general agent," and Samuel Bigger, who is further described as "district agent," and when we come to the signatures they are simply Hubert H. Ward and Samuel Bigger,

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without any further description. When we come to exhibit "C" we find another modification of the original contract; that is headed "to our agents," and signed by the general agent, and it gives them a new schedule of commissions which the company has promulgated. But exhibit "C" is not signed by the plaintiff and, therefore, cuts no figure in the determination of this question. So the question as to who it is who employed Samuel Bigger must be determined by these contracts that I have read, and from all of these contracts, and I have read and called attention to all the parts of them that have any bearing upon the question in hand here. It appears that Samuel Bigger was employed by Hubert H. Ward as an agent to do certain work for Hubert H. Ward. Hubert H. Ward was the man who was in touch with the company and he was the man who assumed to employ Mr. Bigger and assumed to pay him the amounts stipulated in the contracts made. It is nowhere stated that the insurance company is to be liable. The whole transaction is a transaction between Samuel Bigger and Hubert H. Ward. It is true that Hubert H. Ward is repeatedly described as general agent, but does that make the contract a contract of the insurance company?

In *Robinson v. Bank*, 44 Ohio St. 441 [8 N. E. Rep. 583; 58 Am. Rep. 829], there is this case:

"The drawee of a bill of exchange, drawn by the 'Kanawha & Ohio Coal Co.,' was described in the bill as 'John A. Robinson, Agt.,' and it was accepted by him as 'John A. Robinson, Agent K. & O. C. Co.' Held, that the acceptance so made was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him, parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant so accepted the bill intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it."

Now the question what kind of a contract this was, whether an individual contract with the man who signed it or the company's contract, is discussed on page 447 of the opinion, as follows:

"The law as to notes and bills, executed by persons acting as only agents of other persons, is not uniform, but, as a rule, where one acting as agent uses words that import a personal agreement on his part, and signs his own name, it is held to be his individual obligation, although he describes himself as agent; the added words being regarded simply as a description of his person."

Another case holding the same way is found in *Bank v. Cook*, 38 Ohio St. 442:

"The character of the liability of the drawer of a bill of exchange must be determined from the instrument itself; and the addition of

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the word 'agent' to his name, without anything else on the instrument indicating his principal, does not relieve him from personal liability as drawer of the bill."

Barnhisel v. Bank, 7 Circ. Dec. 533 (14 R. 124):

"Where an agent makes a promissory note, signing the same by his name 'as agent,' he is liable as maker of the note, notwithstanding the fact that the payee knew he was acting as such agent at the time.

"The addition of the word 'agent' to his name by the endorser of a promissory note, without anything else on the instrument indicating his principal, does not relieve him from personal liability as endorser."

Another case is *Andenton v. Shoup*, 17 Ohio St. 125:

"Where an agent drew a *post*-dated negotiable check on a bank, and signed it with his own name, adding thereto the word 'agent,' but without indicating thereon the name of his principal, and the party to whom such check was delivered negotiated it to a third person, for a valuable consideration, before the day of its date. *Held*, that the principal is not bound by the check, and the holder cannot maintain an action thereon against him."

Now these authorities are all summed up in Swan's Treatise where he discusses the law of agency at page 366, as follows:

"As to the mode of signature to commercial paper, the somewhat conflicting authorities will, on examination, be found to result in the following reasonable rule: If, from the mode in which the subject-matter of the instrument is set forth in the body of it, or if, from the description therein of the principal or agent, or if, from the terms of the instrument or any other matter therein, it appear that the parties intended it as the promise of the principal, by and through the agent, and the name of the principal appear on the instrument, it is held to be the promise of the principal, however informally signed by the agent, and however informally the promise of the principal, by and through the agent, may be expressed. All, indeed, that seems necessary, is, that the name of the principal should appear upon the face of the instrument, and that the instrument itself should indicate a ministerial act upon the part of the agent."

Now he calls attention to the fact that this is the rule as to negotiable instruments and then he goes to the discussion of the subject in general, and says, page 367:

"But, in regard to other instruments which are signed by an agent in his own name, with the addition of the word agent thereto, or other indication in the contract that the contract is by an agent, the principal may be made liable thereon, whether his name appears upon the paper or not, upon proof that the agent was authorized to make

Bigger v. Insurance Co.

the contract for his principal. In the absence, however, of all indications upon the face of any such contract that the party signing it was acting as agent, the agent only will be liable upon it.

"If the terms of a contract obviously show that the agent intended to be personally responsible, as where he engages expressly in his own name to pay or perform the acts, he will be held personally responsible, although he describe himself in the body of the instrument, or in his signature, as acting in behalf of other persons."

Now apply that language to this case as we have it. In each of these contracts there is no further description that it is the contract of the company than simply the designation of Mr. Ward as general agent. He describes himself repeatedly; but everywhere through the contract, the contract shows that he individually, while the general agent of this company, is making an individual contract with this plaintiff. And when we come to exhibit "B" we find that it is an individual contract of his, purporting to be nothing more, and signed by him alone, without any designation of agency or otherwise, and without any description of himself. It is simply Hubert H. Ward and Samuel Bigger describing themselves in signing this paper. So it seems to me that these three exhibits, containing the whole contract as it is alleged, and all of them showing simply and solely the purpose upon the part of Ward to employ Bigger to take the under part with him and to be solely answerable to him, and to give bond to him and pay money and account for his collections to him, make simply an individual contract between Ward and Bigger, and not between Bigger and the company, and therefore Ward alone is liable upon this contract contained in these three instruments. If this be true, he must be sued where he lives and not where the company can be found, and to sue the company in this county and issue summons to Cuyahoga county for Ward is simply to compel Ward to come into this county to answer to a suit on an individual contract, outside of his jurisdiction and where he has no right to be sued. He having made the contract and being alone liable upon it, is to be sued where he lives and be held to answer there, unless service can be had upon him in some other jurisdiction. So that I think the motion to dismiss for want of jurisdiction should be sustained.

The action will therefore be dismissed at the costs of the plaintiff, as to the defendant Hubert H. Ward.

The action was afterwards dismissed by the plaintiff as to the defendant insurance company.

CARRIERS.

[Hamilton Common Pleas, 1908.]

*BARRON, BOYLE & CO. v. CLEVELAND, C. C. & ST. L. RY.

PRESUMPTION THAT LAST CARRIER DAMAGED GOODS SHIPPED OVER SEVERAL CONNECTING LINES UNLESS REBUTTED BY PROOF TO THE CONTRARY.

The last of several connecting carriers delivering several cars of window glass to the consignee in damaged condition, having receipted in turn to its next preceding carrier for the good order and condition thereof, does not rebut the presumption of fact that it did the damage by proof that a preceding carrier, loading the cars, has among its records memoranda made at the time that a certain number of boxes rattled as they were being loaded; especially since such condition did not prevent such receiving carrier from giving a receipt for their good order, or cause any different handling by reason thereof.

[Syllabus approved by the court.]

C. L. Hopping, for plaintiff.

George Hoadly, for defendant.

HUNT, J.

There is an agreed statement of the facts in this case, except as the damage or breakage of the goods in the hands of other carriers than defendant, might be established by the depositions taken in Boston and by the agreement contained in paragraph five of the agreed statement of facts, *i. e.*, "that the defendant received the shipments in question in sealed cars at Cleveland, Ohio, from the Lake Shore & Michigan Southern Railway; that the defendant carried the same from Cleveland to Cincinnati in said sealed cars; that said cars were not opened and the contents thereof examined while in the possession of the defendant before the same arrived at Cincinnati; that said cars were handled by the defendant in the usual manner in which freight cars are handled and suffered no accident nor any rough handling beyond what is usual in the ordinary handling of freight cars in railway service."

The essential facts as shown by said agreed statement of facts and depositions are as follows: A quantity of window glass was shipped from Antwerp consigned to the plaintiff under a bill of lading by which the ocean carrier receiving it, agreed to carry it to Boston and there deliver it to the American Express Company, which company was to forward it in bond to the plaintiff at Cincinnati. The glass was transported to Boston and was there delivered to the American Express Company and by the American Express Company was delivered to the Boston and Maine Railway. That company, over its own and connect-

*Affirmed, *Cleveland, C. C. & St. L. Ry. v. Barron, Boyle & Co.* 31 O. C. C. 142; also by Supreme Court, without report, March 16, 1909; 54 Bull. 110.

ing lines, transported the glass and delivered it to the defendant company at Cleveland, from which place the defendant company brought the glass to Cincinnati. The glass at the wharf in Boston was placed in sealed cars in bond and such cars in bond were brought through to Cincinnati without being opened. On arrival at Cincinnati the cars were opened and considerable glass found to be broken. The value of the broken glass is agreed upon. All the different connecting carriers, including the defendant, receipted for the glass in apparent good order and there is no evidence where the breakage occurred, except that in the deposition taken in Boston it is shown that some of the boxes containing the glass rattled but the evidence does not show what specific boxes rattled. This rattling was discovered when the boxes were being loaded in the cars. No attention was paid to such rattling by the receiving or any carrier, except that the receiving carrier at Boston has among its records memoranda made at the time that a certain number of boxes rattled as they were being loaded. Such rattling did not prevent the receiving carrier at Boston from giving a receipt for the goods in apparent good order. The bill of lading and the receipts given by the different carriers show that the boxes contained window glass. It is expressly agreed by the parties hereto that the sealed cars containing the glass were handled by the defendant company in the usual manner in which freight cars are handled and suffered no accident or any rough handling beyond what was usual in the ordinary handling of freight cars in railway service. There is, however, no evidence or claim or agreement that the cars were handled in any different or more careful manner than cars containing unbreakable goods.

Plaintiff suggests without argument that the bill of lading given at Antwerp is not a through bill of lading; but whether this was so, or not, does not seem to be material, as between Boston and Cincinnati, the rule as to connecting carriers certainly applies.

The receipts for the glass at Boston and by all the connecting carriers in apparent good order while capable of explanation are not contradicted by the mere fact that the contents of some of the boxes rattled as they were being loaded in cars, with no evidence of anything definite being indicated by such rattling, or that the boxes received any different handling by reason of such rattling, or as to what sort of handling the cars received between Boston and Cleveland or that the cars between Cleveland and Cincinnati were handled as containing breakable goods.

The degree of care necessary depends on the known condition and character of the freight. *Morganton Mfg. Co. v. Railway*, 121 N. C. 514 [28 S. E. Rep. 474; 61 Am. St. Rep. 679]; *Gulf, C. & S. T. Ry. v. Edloff*, 89 Tex. 454 [34 S. W. Rep. 414; 35 S. W. Rep. 144];

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Chouteaux v. Lcech, 18 Pa. St. 224 [57 Am. Dec. 602]; *Bird v. Cromwell*, 1 Mo. 81 [13 Am. Dec. 470].

It is true that the law frequently is applied according to probabilities of fact, but where there is a presumption of law as to definite facts, while a preponderance of the evidence may not be necessary to rebut such presumption, there must be evidence to the contrary at least equally definite.

The receiving carrier at Boston treated the rattling of the boxes containing the goods as unimportant both as to receipt and care and as indicating nothing definite or conclusive as to the condition of their contents and the court, in the absence of any definite testimony to the contrary, following the example set by the carriers, must now so consider it.

It, therefore, only becomes necessary to apply the rule of liability applicable to connecting carriers. Such rule, as admitted by the defendant, is, that when goods are shipped in apparent good order, the last carrier is liable for any damage which said goods may have suffered prior to the delivery by the last carrier, unless it can rebut the legal presumption of fact that it did the damage. *Moore v. Railway*, 173 Mass. 335 [53 N. E. Rep. 816; 73 Am. St. Rep. 298]; *Bullock v. Despatch Co.* 187 Mass. 91 [72 N. E. Rep. 256]; *St. Louis S. W. Ry. v. Birdwell*, 72 Ark. 502 [82 S. W. Rep. 835]; *Gwyn Harper Mfg. Co. v. Railway*, 128 N. C. 280 [38 S. E. Rep. 894; 83 Am. St. Rep. 675]; *Morganton Mfg. Co. v. Railway*, *supra*; *Gulf, C. & S. F. Ry. v. Cushman*, 95 Tex. 309 [67 S. W. Rep. 77]; *Burwell v. Railway*, 94 N. C. 451.

It follows, therefore, that as the defendant company has not rebutted the presumption that it did the damage it is liable therefor, and judgment will be entered for plaintiff.

DEEDS—EVIDENCE.

[Licking Common Pleas, September Term, 1908.]

FOSTER ET AL. V. LONG ET AL.

1. PREPONDERANCE OF PROOF OF UNDUE INFLUENCE OR LACK OF MENTAL CAPACITY INSUFFICIENT TO SET ASIDE DEED FOR CARE AND SUPPORT.

A deed executed and acknowledged by aged and infirm persons, unable to care for themselves and having no near relatives, in consideration of their care and support by grantees, distant relatives, under the rule requiring clear and convincing proof of undue influence of grantees or lack of capacity in grantors, will not be set aside, in an action by the heirs at law after the death of the ancestors, by proof of the mere fact that grantees, who were giving the old people all needful attention and support, did not permit friends to see them alone; nor by the fact that the value of the property conveyed was greatly in excess of the services rendered, in the absence of fraud or unfair treatment shown.

2. MENTAL CAPACITY TO MAKE DEED NOT IMPEACHED.

Lack of mental capacity to enter into a contract and make a deed is not shown, where, from the preponderance of the evidence, it appears that the grantors evidently understood the transaction they were entering into, and explained their reasons for so doing, and designated as the trustee to hold the deed in escrow an old and trusted friend and agent, and in other respects behaved in a rational manner, and were without children or direct heirs.

[Syllabus approved by the court.]

B. F. McDonald and Kibler & Montgomery, for plaintiffs.

Norpell & Norpell and Flory & Flory, for defendants.

MANSFIELD, J.

This is an action to set aside a deed, conveying property described in the petition, purporting to be executed and delivered by one Dr. Vail to the defendants, Mary A. Long and her husband, Charles L. H. Long, on November 29, 1904.

The grantor being dead, the action is brought by plaintiffs as heirs at law, the other heirs at law being made parties defendant. Two grounds are claimed in the petition to warrant the relief prayed for:

1. Undue influence of the grantees upon the grantor at and prior to the time the deed was executed.

2. That grantor did not have mental capacity, at the time the same were made, to execute an instrument of that character or importance.

The answer, after making certain admissions as to the death of grantor, Dr. Vail, his ownership of the property in question, prior to the making of the deed, and that Dr. Vail and wife, at and prior to the time the deed was signed, were somewhat physically infirm, denies each and every other allegation of the petition not specifically admitted to be true. The defendant further answers that the deed

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was executed in pursuance of a certain contract, the consideration of which was that the defendants, Mary Long and her husband, were to receive the real estate in question, and decedent agreed to deed it to said defendants for support theretofore rendered and to be rendered during the balance of the life of Dr. Vail and his wife.

Under the rule laid down in *Willis v. Baker*, 75 Ohio St. 291 [79 N. E. Rep. 466], the burden of proof is upon the plaintiff to sustain either one of the grounds set forth in the petition by clear and convincing proof. Mere preponderance of the evidence is not sufficient, when it appears that the deed was duly executed and acknowledged in the manner and form prescribed by the statute.

In the case at bar the deed upon its face appears to have been duly executed and acknowledged as required by statute, so that the high degree of proof named in *Willis v. Baker*, *supra*, is upon the plaintiff to sustain their contention, that either the execution or signing of the deed was brought about by the undue influence of defendants, Mary A. Long and her husband, Chas. L. H. Long, or that the decedent, Dr. Vail, at the time the deed was executed, did not have sufficient mental capacity to execute an instrument of that important character.

It is clear to the court that on the proposition of "undue influence" the testimony and circumstances are not sufficient to sustain the plaintiff's contention on that question; that if the rule required a mere preponderance and not clear and convincing proof, there would not be the quantum of evidence in the record that would warrant the sustaining of plaintiff's case on that theory.

It is not disputed that for some time before the doctor and his wife went to live at the home of defendants, that because of physical infirmities they were not able to properly take care of themselves, and that neighbors and friends advised them that other means should be provided, and that the attention of the Longs, who were distantly related to the old doctor and his wife, was called to their deplorable condition, and it was suggested to them that they should render some care and give them attention; that soon after the Longs removed them to their home, and up until the death of both gave them the best of care and treatment. Up to this time there is no act of said defendants which could be considered otherwise than consistent with an honest purpose and desire to relieve these old people from their distress, and at least temporarily provide for them. After they had been installed in the home of defendants there is some testimony tending to show that defendants did not desire the old doctor and his wife to be left alone when callers would call on them at the house, and that Mrs. Long was to be notified on such occasions. This

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testimony was principally furnished by a domestic employed in the Long family at the time. Mrs. Long denies specifically any such instructions, and upon the whole testimony, her testimony on that subject appears to be as consistent as that of the other. But granting that Mrs. Long is wrong and the girl is correct, in the absence of other testimony or circumstances, it would not be sufficient to warrant a conclusion of undue influence. It is in evidence that valuable services had at this time been rendered by said defendants in providing the old people with a good home and giving them such care and attention and support as they required, and there is no complaint that it was not needful, nor that anything required for their support and comfort was denied to them, so that no presumption could arise of undue influence from the fact, if it really did exist, that the Longs did not, under the circumstances, permit friends to see the old people without the presence of one of defendants.

Upon the second proposition the court thinks plaintiff must fail. A great many witnesses were examined as to the mental capacity of Dr. Vail at and prior to the time of executing the deeds in question. The attorney who drew the contract and deeds testified as to his mental capacity and says that he understood the transaction, that he told him what his property consisted of, the reason why he desired to enter into the contract and make the deed, and designated the trustee to hold the deed in escrow. This trustee was his trusted agent and advisor. All the circumstances, if the testimony is to be believed, are the acts of the rational mind of a man who is about to transact business of that important character. That the evidence of Mr. Black is in accordance with the trust is brought out by other circumstances, among which is the fact that defendants were absent at the time of talk between Black and doctor and his wife, that these old people's surroundings had been greatly improved, that both the doctor and his wife seemed to appreciate the nearing of the end, and that they had no children or direct heirs, that the final carrying out of the arrangement for their protection was left to their trusted advisor and agent, who for a long time prior to the death of the doctor had knowledge of the existence of the deed and contract, and whose motive and honesty or fidelity to any trust that had been placed in his hands had never been questioned. All these circumstances and many others that might be mentioned corroborate the testimony of Mr. Black.

Independent, however, of Mr. Black's testimony, the court is of the opinion that the plaintiffs have failed to establish the mental incapacity of Dr. Vail at the time of the execution of the deed and contract by clear and convincing evidence. In fact upon the whole case, I am strongly inclined to the opinion that the defendants have sus-

tained the mental capacity of Dr. Vail by a preponderance, and in making this statement I am not unmindful of the rule of law, that a greater degree of capacity is required to execute a contract or deed than in making a will, although it might be said, taking into consideration that contemporaneous with the making of the contract and deed the doctor disposed of the balance of his property, the execution of the deed and contract, under the circumstances, partook of and was in the nature of a testamentary disposition of property.

Upon the question of his mental capacity, some sixteen witnesses testified for plaintiff, and twenty-six for defendants, covering a period of time concerning various transactions, talks and observations of about two years prior to his death. That the doctor and his wife for several months before they were taken to the Longs were physically infirm, there cannot be any contention. That their condition by reason of such infirmities was pitiful cannot be questioned, and that their mental temperament during such time might be and was affected somewhat, can be gleaned from the testimony of the witnesses and the circumstances surrounding these old people during that time. And yet the testimony discloses many instances during this period when their suffering was perhaps the worst and physical condition most deplorable, that the doctor transacted some items of business, sufficient to indicate that at least a part of the time, and with reference to specific instances, he could and did comprehend such ordinary transactions.

John L. Haven, one of the witnesses for plaintiffs, and who had acted as advisor of the old doctor in many business matters, and looked to a certain extent after certain investments and the collection of interest, and who came in contact with him in a business way perhaps oftener than other persons, testifies that although his physical condition was bad for probably a year before he came over to town, his "mental faculties appeared to be good until almost the last," that all the witnesses could notice "was a shortness of memory" (which is not unusual in men of that age, but which does not necessarily signify a weakening of the will power or lack of comprehension of an important business transaction).

Again, neighbors and friends who called upon the old doctor after he and Mrs. Vail came to live with the Longs, up to a few days before his death, testify to holding conversation with him and discussing the ordinary topics of the day, and moreover instances are cited by disinterested witnesses, at or about the time the deed and contract were executed, of intelligent talks had with the doctor on current events, and these witnesses, old friends and neighbors, say he was up to the standard of the average man of his age.

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There are perhaps many circumstances and instances that are of considerable weight, tending to sustain the contention of plaintiffs, but it is clear to the court that, under the rule of law announced in the first instance, that the proof must be clear and convincing before the deed in question can be held void and set aside, that plaintiffs have not produced that high degree of proof; rather it seems to me, upon the question of mental capacity, the testimony of defendants predominate.

With the determination of the case, upon the grounds mentioned, the value of the property conveyed as compared with the value of the services rendered under the contract is of no importance. Inadequacy, if shown, of the consideration of a deed may become important when the circumstances, which, taken in connection with such inadequacy, clearly indicate that a fraud was perpetrated; but when in a case like the present, the contention of the plaintiff is overcome by evidence of the defendants that Dr. Vail had mental capacity to make the deed in question, it has no application.

It is therefore ordered that plaintiff's petition be dismissed and judgment for costs be ordered against them.

MASTER AND SERVANT.

[Superior Court of Cincinnati, March, 1909.]

CLAUD GASKINS V. WILLIAM POWELL CO.

1. NEGLIGENCE OF MASTER IN FURNISHING REASONABLY SAFE INSTRUMENTALITIES TO SERVANT A QUESTION FOR THE JURY.

In an action for personal injuries resulting from an explosion in a crucible of molten brass caused by attempting to remove an air tight scum formed from, and retaining gases generated by, putting oil brass turnings therein, the question whether the master, in the exercise of the duty of furnishing a servant reasonably safe instrumentalities of service, failed to properly discharge this duty when he furnished oil brass turnings for melting without warning as to the latent dangers thereof, is for the jury; there being evidence supporting a finding of negligence in this regard by the master, a new trial will not be granted.

2. INSTRUCTION COVERING CONSEQUENTIAL OR SPECIAL RISK.

An instruction "If a work is attended with danger and to avoid the danger knowledge of scientific facts is required, as, for example, a knowledge of chemistry or a knowledge as to the properties or actions of gases, such a risk will not be deemed to have been open, obvious or assumed, unless it appears that the servant had previous scientific knowledge, the result of experiment or experience to an extent necessary to enable him to comprehend and avoid the danger," being designed to cover consequential or special risk of a given character, necessary and proper under the evidence, will not be questioned as to correctness, especially since no exception was taken thereto.

[Syllabus approved by the court.]

Superior Court of Cincinnati.

MOTION for new trial.

Robertson & Buchwalter, for the motion.

Cogan & Williams and Kinkead, Rogers & Ellis, contra.

HOFFHEIMER, J.

This was an action for damages for personal injury. There can be no doubt about the injury to plaintiff's eye or as to the loss of time, loss of earnings and pain and suffering endured. The verdict in plaintiff's favor was for \$3,500, and in view of the evidence, I am unable to say, even if that were claimed, that such sum for the injury sustained is in any way excessive.

The defendant, however, complains, that plaintiff's case revealed no charge of negligence—in short, that there was nothing to submit to the jury, and nothing upon which a finding of culpable negligence by the jury could be predicated.

The case was tried on the theory that on the day of the alleged injury, defendant, through its agents and servants, caused a certain crucible to be filled with oil brass turnings for the purpose of melting the same; that defendant knew or ought to have known that the brass turnings which were used were covered with oil, and that melted in an open crucible, gases were liable to form between the surface of the molten metal and the scum, rendering an explosion liable to occur on plaintiff's undertaking to skim the surface in the usual manner; that plaintiff had no knowledge of these facts; that the work involved a danger unknown to the servant (the plaintiff), and known to the master, and further that the master failed to advise the plaintiff that the crucible contained oil brass turnings, and failed to advise him of the danger that he would incur in attempting to remove the scum with a ladel in the usual manner. The claim of the plaintiff is that by reason of the foregoing, directly and proximately, and while in the proper discharge of his duties as servant of the defendant, he suffered the injuries complained of, and was without fault on his part.

The answer of the defendant was a general and specific denial. The question therefore was, did the master who owed the servant the duty of furnishing reasonably safe instrumentalities of service, fail to properly discharge this duty, if he furnished oil brass turnings to be melted under the circumstances as claimed by plaintiff, and if there was a duty to advise plaintiff of latent danger, was the duty properly discharged?

Defendant contends that there was no evidence to sustain the charge made by plaintiff and he contends "that no one has testified that there was oil in the filings." Attention, however, to the evidence will show that J. S. Penticost, who was furnace tender for the defend-

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ant on the day of the injury, "melted the metal for plaintiff on this day, and prepared it for him," and with reference to the third heat (when the injury was occasioned) he remembers, that at "that one time he used oil turnings." So much for the claim that no one testified that oil filings were used.

It is also claimed that the witnesses for plaintiff made it clear that even if oil turnings were used, it could make no difference, because, it is claimed, the oil went up the stack and that consequently there was nothing left of plaintiff's case. But plaintiff offered testimony tending to prove that the use of what is commonly known as oil brass turnings caused a slack or scum to form on the top of the molten metal which would imprison the air; that on the skimming of this slack in the usual manner an explosion would be likely to occur. Plaintiff testified that his skimmer was dry; that he never saw an explosion of this kind before. It also appears that oil brass turnings were used (Penticost, *supra*), and that an air tight scum forms on the top of oil brass turnings. The nature of this scum due to an admixture of iron or inferior metal in the turnings, of which the magnet removes but one-third, and the formation of air-tight scum, and the liability to explosion on the breaking of this slack is all shown.

These matters appearing, under the claim of plaintiff the question as to whether defendant under the circumstances did what ordinary care required, with reference to discharging the duties owing by the master to the servant, was certainly a question for the determination of the jury, and, as the jury has found, under the instructions given, that the defendant did not exercise the care required, and inasmuch as there is testimony to support such finding this court has no power to interfere.

Defendant complains that the court erred in that part of its charge, wherein it is said:

"If a work is attended with danger and to avoid the danger knowledge of scientific facts is required, as, for example, a knowledge of chemistry or a knowledge as to the properties or action of gases, such a risk will not be deemed to have been open, obvious or assumed, unless it appears that the servant had previous scientific knowledge, the result of experiment or experience to an extent necessary to enable him to comprehend and avoid danger."

No exception was taken to the charge as given, and if the correctness of the proposition laid down may be considered at all, it may be proper to state, that the charge was designed by the court to cover the case of a consequential or special risk, which, under the evidence, the court deemed necessary and proper. *Lake Shore & M. S. Ry. v. Fitzpatrick*, 31 Ohio St. 479; *Wagner v. Chemical Co.* 147 Pa. St. 475.

[23 Atl. Rep. 772; 30 Am. St. Rep. 745]; *Smith v. Car Works*, 60 Mich. 501 [27 N. W. Rep. 662; 1 Am. St. Rep. 542]; *Frank v. Brewing Co.* 18 Dec. 601 (5 O. L. R. 559).

For these reasons the motion for a new trial is overruled.

BANKS AND BANKING—SET-OFF.

[Licking Common Pleas, January Term, 1907.]

A. A. STASEL, RECVR. v. G. C. DAUGHERTY.

MAKER OF PROMISSORY NOTE CANNOT SET OFF DEPOSIT IN HIS NAME AS EXECUTOR.

The maker of a promissory note held by the receiver of an insolvent bank has no right to set off a deposit in the bank standing in his name as executor.

[Syllabus approved by the court.]

A. A. Stasel, for plaintiff.

Kibler & Montgomery, for defendant.

SEWARD, J.

This case is submitted to the court upon the pleadings and the evidence. I might say that there is, substantially, an agreed statement of facts in the case.

This is a suit brought by Stasel, as receiver, against Daugherty to recover on a promissory note. Daugherty files an answer setting up what is claimed to be a set-off, he having been a depositor in the bank of which Stasel is receiver. That deposit is in the name of Daugherty as executor of Hickey.

The question is whether Daugherty has a right to set off this claim which he has against the bank as executor.

The court does not think he has, and there may be a judgment for the plaintiff. Motion for new trial overruled.

INTOXICATING LIQUORS.

[Adams Common Pleas, January, 1909.]

*STATE OF OHIO V. FRANK KENDLE.

1. SALES OF LIQUOR ON THE OHIO RIVER TO RESIDENTS OF A DRY COUNTY UNLAWFUL.

Ohio courts have jurisdiction of crimes and offenses committed on the Ohio river opposite its shores, and this is so although the statute defining the offense makes it unlawful to do the act "within the limits" of any county where prohibited, act 99 O. L. 35, the Rose county local option law.

2. FEDERAL INTERNAL REVENUE TAX RECEIPT DOES NOT AUTHORIZE SALE IN DRY COUNTIES.

A receipt from the United States government for the tax levied upon the retailer of intoxicating liquors does not authorize the owner to violate any of the laws of the state where issued, nor to sell intoxicating liquors at retail in any county where the sale is prohibited by law.

[Syllabus approved by the court.]

At the January term, 1909, of the court of common pleas of Adams county, Ohio, the grand jury returned an indictment against the defendant, Frank Kendle, charging a violation of the Rose law. The facts sufficiently appear from the following agreed statement of facts:

"It is agreed by and between the parties to this action, the state, represented by C. C. W. Naylor, prosecuting attorney, and the defendant in person and by his counsel, W. P. Stephenson and W. S. Foster, that the following are the agreed facts in this case:

"First. That on the twenty-ninth day of September, 1908, at an election duly called and held under what is known as the Rose county local option law, a majority of the votes cast at said election were in favor of prohibiting the sale of intoxicating liquors within the limits of Adams county, Ohio, and that within the limits of said Adams county, Ohio, the sale of intoxicating liquors as a beverage is prohibited and unlawful, and has been from and after thirty days from said twenty-ninth day of September, 1908.

"Second. That the defendant, Frank Kendle, on the thirteenth day of December, 1908, sold to John Harris, the person named in the indictment, intoxicating liquor, to wit, whiskey, to be used as a beverage; that said John Harris was at the time a citizen and resident of Adams county, Ohio.

"Third. That the said Frank Kendle was not then and there a regular druggist, and said sale was not for exclusively known medicinal, pharmaceutical, scientific, mechanical, or sacramental purposes, nor was

*Affirmed by circuit court, without report, May, 1909. Cited and distinguished in *Savors v. State*, 19 Dec. 878.

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said sale made in good faith upon a written prescription signed and dated in good faith by a reputable physician in active practice.

"Fourth. That said sale was made by the said Frank Kendle on board the steamer *Bertha Schumate* while said steamer was moored in the Ohio river, opposite the shores of Adams county, Ohio, and beyond the low water mark on the Ohio side of the river and about fifty yards from the Ohio shore, said steamer being at the time on the Ohio river between the upper and lower boundaries of Adams county, Ohio, that is to say, that if the upper and lower boundaries of said Adams county, Ohio, were extended into the Ohio river said steamer would be between said lines.

"Fifth. It is also admitted, if the same is competent in this case, that said defendant, Frank Kendle, at the time and place of this sale had in his possession the following government receipt, namely:

"\$16.67

No. 113645

"Series of 1908.

Series of 1908.

"UNITED STATES STAMP FOR SPECIAL TAX.

"INTERNAL REVENUE.

"Act of October 1, 1890.

"Received from Schumate and Kendle the sum of sixteen 67.100 dollars for special tax on the business of retail liquor dealer at Steamer *Bertha Schumate*, Ohio river, state of Ohio, for the period represented by the coupon or coupons hereto attached.

"Dated at Cincinnati, November 13, 1908.

"B. Bettmann, Collector 1st Dist., State of Ohio.

"\$25 per year.

"Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business.

"This stamp is simply a receipt for a tax due the government, and does not exempt the holder from any penalty or punishment provided by the law of any state for carrying on the said business within such state, and does not authorize the commencement nor the continuance of such business contrary to the laws of such state, or in place prohibited by municipal law. See Sec. 3243 U. S. Rev. Stat.

"There are attached to said receipt the following coupons:

"Coupon for retail liquor dealer's special tax for Nov., 1908.

"Coupon for retail liquor dealer's special tax for Dec., 1908.

"Coupon for retail liquor dealer's special tax for Jan., 1909.

"Coupon for retail liquor dealer's special tax for Feb., 1909.

"Coupon for retail liquor dealer's special tax for March, 1909.

"Coupon for retail liquor dealer's special tax for April, 1909.

“Coupon for retail liquor dealer’s special tax for May, 1909.

“Coupon for retail liquor dealer’s special tax for June, 1909.

“It is further agreed by the parties that a jury be waived and the cause submitted to the court without the intervention of a jury upon the foregoing agreed statement of facts.”

C. C. W. Naylor, Pros. Atty., for plaintiff.

W. P. Stephenson and W. S. Foster, for defendant.

CORN, J. (Orally.)

This case is submitted to the court upon an agreed statement of facts and the determination of it hinges largely, if not wholly, upon the question of the jurisdiction of courts of common pleas of crimes and offenses committed upon the Ohio river beyond low water mark.

It is practically conceded by the arguments of counsel that this court does have jurisdiction of crimes and offenses committed on the Ohio river opposite the shores of Adams county, as I understand the arguments of counsel, but they maintain that in order to exercise that jurisdiction or invoke that jurisdiction and have it properly exercised, it must be alleged or set out in the indictment.

That, so far as this court is concerned, is a new question. I have never had that question raised before, but I do not regard it as serious.

This case is one of considerable importance. It creates a question which in all probability would not have been raised, if it had not been for the passage of the Rose county option law and the advantage taken of it by the counties bordering on the Ohio river to declare that the sale of intoxicating liquors as a beverage should be prohibited in the various counties, I believe beginning with Hamilton county; above Hamilton county—from that county on up the river practically to the Pennsylvania line—is a strip of dry territory.

If the contention of the defendant is correct, that under and by virtue of his government license he could ply the Ohio river and sell intoxicating liquors as a beverage to the citizens residing in these dry counties, then so far as the Rose county local option law (act 99 O. L. 35) is concerned in counties bordering on the Ohio river, it amounts to nothing. It permits a person to sell intoxicating liquors in those counties without enabling the county to control the sale of it, and without enabling municipalities along the river to control the sale of it, and at the same time depriving the counties and the municipalities along the Ohio river of the Aiken tax which is imposed by the state upon the retailer of intoxicating liquors.

Now, if the contention of the defendant is valid, let us see where this would end. A man could take an ordinary family boat, as it is called, moor it in the Ohio river opposite any municipal corporation

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in this state, and, so long as outside of low water mark, could sell intoxicating liquors at his pleasure. If one man could do this, a hundred or any number could do it. And by means of skiff a number of what might practically be termed saloons could exist opposite and along the shores of the Ohio river, and the courts would be powerless to reach and control cases of that kind.

Now that may be the law in Ohio; that may be the law under the Rose county local option law; that may be the right of the defendant in this case; but if it is, some other court than this must declare it to be the law. I am going to decide this question in favor of the enforcement of the law; I am going to decide it so as to give effect to this Rose county local option law. The jurisdiction of the courts of this state extends to all crimes and offenses committed on the Ohio river anywhere, and I do not believe that the use of the term "within the limits" of any county affects the case, any more than the terms used in any of the other statutes or the requirements of criminal procedure, that an offense charged must be shown to have been committed within the county in which it is alleged or in which the prosecution is being had.

I do not believe that, if this defendant, instead of selling intoxicating liquors in violation of the law on board his little boat, had committed an assault upon one of Ohio's citizens or a citizen of another state, or had committed a homicide upon his boat, that he would escape trial and punishment by the court, saying that it occurred on the Ohio river beyond the limits of low water mark. I think that either the state of Kentucky or the state of Ohio, whichever assumes the jurisdiction and obtains custody of the defendant first, would have full and complete jurisdiction to hear and determine the case and inflict punishment.

I am aware of one decision of the circuit court of this circuit, which might tend to limit the jurisdiction to the Ohio side of the thread of the stream. We had a case in Lawrence county of a number of persons who had caught logs adrift upon the Ohio river when the price for catching logs was different in Ohio and in West Virginia. The logs belonged to Crane & Company. It was claimed by them that the persons who had caught the logs had caught them beyond the thread of the stream, nearer the West Virginia than the Ohio shore, and landed them temporarily upon the Virginia shore, because they were nearer to that shore, and after the river receded towed the logs to the Ohio shore in order to collect the greater price for taking up and securing logs. These persons claimed to have a right to retain possession of the logs until the charges were paid and demanded the Ohio price. Crane & Company tendered the West Virginia price for catching logs, and being refused instituted an action in replevin. The common pleas court, Judge Collings sitting, I think, decided in favor of the Ohio price. The

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circuit court reversed the decision, holding that logs caught on the Ohio side of the thread or middle of the stream could be charged for at the Ohio price, but if caught beyond the thread or middle of the stream on the West Virginia side, then the taker up could not collect more than the charge fixed by West Virginia statute.

Out of consideration of public policy I do not believe that the court in a case like this, or in any criminal case, ought to be bound by that decision. I have already indicated to counsel the effect of granting the claims of the defendant in this case, that he is beyond and without the jurisdiction of this court. It is very far reaching in its results; of very great interest to the state as well as to the defendant. As I have already said, so far as I am concerned, I think this case ought to be decided in the interest of upholding the law in the state of Ohio, and avoiding the injurious effects and results that might come from failure to do so.

In preparing the charge in this case, among other things I had prepared to say to the jury was, "the fourth element which the state is required to make out beyond a reasonable doubt is that, such unlawful sale, if one was made, occurred within the limits of Adams county, Ohio." I had prepared the charge as follows:

"On this branch of the case I charge you that if it appears from the evidence that the defendant made the sale, if one was made, on or from a boat moored in the Ohio river, or floating or running on the Ohio river, opposite any part of Adams county, that is, between the upper and lower boundaries of the county on the river, that would be within Adams county, within the meaning of the law, and would make the defendant amenable to the laws of Ohio, and bring him within the jurisdiction of this court."

Counsel can readily see if the case had gone to the jury and had I charged the jury in that way I would have followed, so far as applicable to this case, the language of Judge Belden in *State v. Stevens*, 1 Dec. Re. 82 (2 W. L. J. 66), which I think substantially states the law, if for no other reason, by reason of the Virginia Compact at the time of the cession of the territory.

I take this view for another reason, namely: That that particular case went to the Supreme Court, and while it was reversed, it was not reversed upon that branch of the charge, although that was one of the assignments of error. I am aware that the Supreme Court dismissed the question with the statement that there was no evidence showing the charge to be material to the facts in the case, and so far as disclosed by the bill of exceptions was an abstract proposition of law. *Stevens v. State*, 14 Ohio 386.

But the Supreme Court would not do a vain thing, and I feel

sure that if the Supreme Court believed that that charge did not correctly state the law applicable to such cases, in sending the case back for a new trial, that court would certainly have said that the trial court erred in charging the jury in that manner; otherwise the same error would have occurred again. The attention of counsel is directed to the following as bearing upon the territorial boundaries of Ohio, and upon the question of the criminal and civil jurisdiction of the courts of Ohio:

Act of congress, approved April 30, 1802, 1 Chase 70; Art. 7, Sec. 6, Const. of 1802; *Eckert v. Colvin*, 1 Dec. Re. 11 (1 W. L. J. 54); 4 W. L. J. 145-164; 5 W. L. J. 433-437; 3 W. L. J. 310, 337; *McCollock v. Aten*, 2 Ohio 308; *Benner v. Platter*, 6 Ohio 505; *Blanchard v. Porter*, 11 Ohio 138; *Booth v. Hubbard*, 8 Ohio St. 243, 245; *Handly v. Anthony*, 18 U. S. (5 Wheat.) 374 [5 L. Ed. 113].

The statement in the agreed statement of facts that the defendant had in his possession a receipt for the special tax levied by the United States government upon the sale of intoxicating liquors at retail, constitutes no defense to this prosecution, nor is such receipt a warrant or authority for the defendant to violate the laws of Ohio, nor to sell intoxicating liquors in a territory where by the laws of such territory the selling is prohibited and unlawful. The government does not authorize the doing of an unlawful act, and this receipt specifically so states.

So that, upon the agreed statement of facts, I find and adjudge that the defendant is guilty in manner and form as he stands charged in the indictment.

MUNICIPAL CORPORATIONS—RAILWAYS.

[Logan Common Pleas, 1908.]

WILLIAM CASKEY v. BELLE CENTER (VIL.).

GEORGE COMBS v. BELLE CENTER (VIL.).

1. RAILWAY SPEED ORDINANCE ENFORCIBLE BY CRIMINAL PROCEEDINGS HELD INVALID.

A municipal ordinance "to regulate the speed of railway locomotives and cars within the corporate limits." by imposing a fine for violation thereof, is in contravention of Sec. 2500 (Lan. 3762; B. 1536-182) Rev. Stat. which prescribes recovery by "civil action" only, and notwithstanding the ordinance prescribes the same amounts as the statute, it is rendered invalid by providing enforcement by criminal proceedings.

2. AN ORDINANCE REGULATING SPEED OF TRAINS AND RINGING OF BELL CONTAINS MORE THAN ONE SUBJECT AND IS INVALID.

An ordinance "to regulate the speed of railway locomotives" in municipal limits, which fixes the maximum speed thereof, and requires that the locomotive bell shall be rung continuously while the train may be run-

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ning through the corporate limits, contravenes Sec. 1694 (Lan. 3106; B. 1536-620) Rev. Stat., prescribing that no ordinance shall contain more than one subject.

3. ORDINANCE REQUIRING BELL TO BE RUNG CONTINUOUSLY IN MUNICIPAL LIMITS IS INVALID.

An ordinance requiring that the bell on a railway locomotive, running through municipal limits, shall be rung continuously, regardless of the fact that it may not be "approaching a turnpike, highway, town road or crossing" enlarges upon the provisions of Sec. 3336 Rev. Stat. and is invalid.

[Syllabus approved by the court.]

West & West and E. P. Chamberlain, for plaintiffs.

Briggs & Stewart, for defendant.

BRODRICK, J.

These are proceedings in error, and being of the same nature and identity, I will only refer to case No. 10440 in rendering my opinion, as a matter of convenience, but all that is said in that case applies with equal force and effect to case No. 10441.

On March 5, 1907, the council of the village of Belle Center passed an ordinance, No. 102, entitled "Railway speed ordinance; an ordinance to regulate the speed of railway locomotives and cars within the corporate limits of the incorporated village of Belle Center, Ohio, and providing as follows:

"Section 1. Be it ordained by the council of the incorporated village ———, Logan county, Ohio, that it shall be unlawful for any person or persons, engineer or conductor or railroad company to run or propel any locomotive or railroad car on any railroad track within the corporate limits of the village of Belle Center, Ohio, at a greater rate of speed or velocity than the rate of ten (10) miles per hour, and every person or persons, engineer or conductor or railroad company running a locomotive or cars on any railroad track within the limits of said village is hereby required to ring the bell continuously upon such locomotive, as he may be running through said corporate limits. If any person or persons, engineer, conductor or railroad company shall violate any of the provisions of this section, he or they shall forfeit and pay for each and every such offense a fine of not less than five dollars (\$5) nor more than fifty dollars (\$50) with costs.

"Section 2. It shall be the duty of the marshal and he is hereby invested with full power to arrest, upon view or information and without process, any person or persons violating Section 1 and bring him or them before the mayor.

"Section 3. This ordinance shall take effect and be in force from and after its passage and legal publication."

The ordinance was duly published March 8, 1907, as appears from the certificate of the clerk of said village.

On the twenty-second day of April, 1908, W. G. Oliphant filed his affidavit with the mayor of said village, charging the said William Caskey with violating the provisions of said ordinance in the following particulars:

"That on or about the eighteenth day of April, 1908, at the municipal corporation and county aforesaid, one William Caskey, then and there being, and then and there being in charge of two steam engines and train of cars as conductor, which was then and there run and propelled by steam over the railway track of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, which extends through the limits of said corporation, and the said William Caskey as aforesaid being then and there conductor and in charge of said train as aforesaid, did then and there run said train through said corporation at a speed greater than ten miles an hour, contrary to an ordinance of said village in such cases made and provided."

Thereupon a warrant was issued to W. G. Oliphant, marshal of said village, who by virtue thereof arrested the said William Caskey and brought him before the mayor of said village, whereupon a trial was had, and the mayor finding said William Caskey guilty, assessed a fine of \$50 against him, and adjudged the costs of prosecution against him.

A bill of exceptions was duly taken and signed by the mayor, together with a transcript of the docket entries, and a petition in error is filed to reverse the findings and judgments of said mayor, upon the following grounds as stated in said petition:

"1. The said mayor of the said village of Belle Center, Ohio, did not have jurisdiction of the subject-matter of said proceedings, nor of the person of said plaintiff in error, nor jurisdiction to impose a fine upon the said plaintiff in error for the violation of said ordinance.

"2. The said mayor erred in assuming jurisdiction of the subject-matter of said proceeding.

"3. The said mayor erred in overruling the motion filed before him to set aside his said finding, sentence and judgment, and for a new trial.

"4. The mayor erred in imposing the sentence in said proceeding against the plaintiff in error.

"There are other errors manifest upon the face of said proceedings prejudicial to the plaintiff in error."

Section 2500 (Lan. 3762; B. 1536-182) Rev. Stat. conferring the power upon municipal corporations to regulate the rate of speed of steam railroads, provides as follows:

"When a railroad track is laid in a municipal corporation, the

council may by ordinance regulate the speed of all locomotives and railroad cars within the corporate limits; provided, such ordinance shall not require a less rate of speed than four miles an hour, and in villages having a population of two thousand or less, it shall not be fixed at a less rate than eight miles an hour; and the corporate authorities may by civil action, recover against any engineer, conductor or company violating such ordinance a sum not less than five dollars nor more than fifty dollars for each offense."

It will thus be seen that the same grant of power by the legislature to municipal authorities to provide for the regulation of the speed of locomotives and railroad cars provides the penalty for the violation of the ordinance, and the manner in which said penalty may be enforced, viz., by a civil action.

The penalty provided by the ordinance under consideration is the same as that provided by statute, but the remedy for its enforcement is by criminal prosecution.

The first question, therefore, to be determined is as to the jurisdiction of the mayor to proceed under the provisions of the ordinance by criminal proceedings. Legislative grants to municipal corporations are always strictly construed, and such corporations may not exceed the authority so granted.

In the case of *Canton v. Nist*, 9 Ohio St. 439, it was held by the Supreme Court, that:

"An ordinance of a municipal corporation, prohibiting, under a penalty, the opening of shops, etc., for the purpose of business, on Sunday, without excepting cases of necessity and charity, and without exempting from its operation persons who conscientiously observe the seventh day of the week as the Sabbath, is inconsistent with the laws of the state, and therefore void."

On page 440 the court say:

"But the powers here conferred are expressly limited, in the preceding part of the same section, to such ordinances as are 'not inconsistent with the laws of this state.' And this limitation, even if not expressed, must doubtless be regarded as implied in all such general grants of power; for it must be presumed that the legislature would not intend to give to a corporation the power of contravening and defeating state policy by ordinances inconsistent with the laws of the state. Is, then, Sec. 2 of this ordinance consistent with the policy of the state as indicated by her legislature?"

After quoting the statute law, the court continues:

"The penalty imposed by this section clearly indicates the general policy of discriminating between secular days and Sundays, and of regarding the latter as a day of rest, upon which common labor,

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sports, and the employments therein named, are prohibited. But the *exceptions* which it contains are equally expressive of state policy. The statute proceeds on the principle that works of *necessity* may be performed on any day; that 'it is lawful to do good, even on the Sabbath days'; and upon the further principle that persons who conscientiously observe another day of the week as the Sabbath, shall not be required to abstain from employments, otherwise lawful, on Sunday."

Adopting the same method of reasoning used by the court in the case of *Canton v. Nist, supra*, as applicable to the case at bar, it will be readily seen that the enlargement of the remedy for a violation of the ordinance in question is just as inconsistent with the state law granting the right to the municipality as would be the enlarging of the scope of the authority so granted.

Neither would Par. 29 of Sec. 7, Mun. Code of 1902 (Lan. Rev. Stat. 3102; B. 1536-100), apply. Said paragraph reads as follows:

"[*Penalty for violation of ordinance.*] To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both; provided, that such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months."

This paragraph is contained in the general enumeration of powers granted to municipal corporations, and cannot control specific powers granted to such municipal corporations.

In the case of *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118, the first point of the syllabus reads as follows:

"1. Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."

On page 121 the court say:

"Such corporations, being created for convenience and economy in government, and to aid the state in legislation and administration of local affairs, are always subject, in their public capacity, to the control of the state. As a result of this limitation, this corporation cannot possess the power referred to unless the same has been conferred by statute. Indeed, it is conceded by the learned counsel for plaintiff, that the power to pass the ordinance does not exist unless it has been expressly granted by the legislature, or is clearly implied, and there is no doubt that this is the law. Power to enact such an ordinance would not be inherent in the council. Except as to incidental powers, such as are essential to the very life of the corporation, the presumption is that the state has granted in clear and unmistakable

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terms all it has designed to grant at all. Doubtful claims to power are resolved against the corporation." Citing, *Cooley*, Const. Lim. 233, 234; *Minturn v. Larue*, 64 U. S. (23 How.) 435 [16 L. Ed. 574], and *Bloom v. Xenia*, 32 Ohio St. 465. See, also, *Townsend v. Circleville*, 78 Ohio St. 122 [84 N. E. Rep. 792; 16 L. R. A. (N. S.) 914].

When the legislature grants the power to a municipal corporation to enact certain legislation, and provides in the same act the penalty for its violation, this excludes all other remedies under the well known maxim: "*Expressio unius est exclusio alterius.*"

I am therefore of the opinion that the ordinance in question is void, in that it attempts to provide a different penalty, and a greater method of enforcing the same, than is granted by statute, and the mayor was wholly without jurisdiction in attempting to enforce the ordinance in any other manner than that pointed out by statute.

It is not necessary that the ordinance contain any mention of the penalty for its violation. If the ordinance provides for the regulation of the speed of locomotives and cars, then the statute itself provides the penalty and the remedy for its violation, and that is by a civil action against either the conductor, engineer or company.

There are two other reasons why the ordinance in question is void.

Section 1694 (Lan. 3106; B. 1536-620) Rev. Stat. provides that, "No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title." The ordinance in question is entitled "Railway speed ordinance; an ordinance to regulate the speed of railway locomotives and cars within the corporate limits of the incorporated village of Belle Center, Ohio." The ordinance then fixes the rate of speed, and also contains the further provision "and every person or persons, engineer or conductor or railroad company running a locomotive or cars on any railroad track within the limits of said village is hereby required to ring the bell continuously upon such locomotive, as he may be running through said corporate limits." And the remedy provides that, "If any person or persons, engineer, conductor or railroad company shall violate any of the provisions of this section, he or they shall forfeit and pay for each and every such offense a fine of not less than five dollars nor more than fifty dollars, with costs."

There are two separate and distinct subjects contained in this ordinance, while only one of them is clearly expressed in its title.

Again, the second subject is provided for in Sec. 3336 Rev. Stat.. which reads as follows:

"Every company shall have attached to each locomotive engine passing upon its road, a bell of the ordinary size in use on such en-

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gine, and a steam whistle; and the engineer or person in charge of an engine in motion and approaching a turnpike, highway, town road, crossing or private crossing where the view of said private crossing is obstructed by embankment, trees, curve or any other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from the place of such crossing, and ring the bell continuously until the engine passes such crossing; but the provisions of this section shall not interfere with the proper observance of any ordinance passed by any city or village council regulating the management of railroads, locomotives and steam whistles thereon, within the limits of such city or village."

It will be observed upon a careful reading of this section of the statute that the sole object of the signals is for the protection of persons who may be traveling upon highways crossing the railroad, and the engineer or person in charge of the locomotive is only required to ring the bell upon such locomotive until the engine has passed such highway, while under the provisions of the ordinance, the engineer or person in charge of the locomotive is required to ring the bell continuously through the entire corporate limits, regardless of any highway crossings, which is attempting to enlarge upon the provisions of the statute, is clearly inconsistent therewith, and falls directly under the decision of *Canton v. Nist, supra*. See also opinion of court in the case of *Ravenna v. Pennsylvania Co., supra*, on page 125.

The findings and judgments of the mayor will, therefore, be reversed and the plaintiff in error in each case discharged. Judgment against defendant in error in each case for costs. Exceptions noted on behalf of defendant in error.

BANKRUPTCY.

[Hamilton Common Pleas, March, 1909.]

W. R. THRALL v. UNION MAID TOBACCO CO.

CREDITOR OF CORPORATION ADJUDGED BANKRUPT CANNOT SUE TO ENFORCE STOCK SUBSCRIPTIONS.

A trustee in bankruptcy is vested with sole power by Sec. 47-2 of the bankruptcy act to maintain an action to enforce payment of stock subscriptions after the corporation is adjudged bankrupt; demurrer by such trustee will lie to the petition of a creditor instituting such an action.

[Syllabus approved by the court.]

DEMURRER to petition.

J. S. Conner and Charles A. J. Walker, for A. J. Redway.
 Edwards Ritchie, for W. R. Thrall, trustee.
 Millard Tyee, for Cincinnati Gunning Co..

GORMAN, J.

This cause was, by order of Judge James B. Swing, of this court, on February 6, 1909, consolidated with cause No. 137989, *Cincinnati Gunning Co. v. A. J. Redway et al.*, and ordered to proceed under the number of this cause on the ground that the two suits were substantially for the same purpose—to enforce the payment of stock subscriptions made for the stock of the Union Maid Tobacco Company.

Both suits were filed after the petition was filed in the United States district court to have the Union Maid Tobacco Company adjudged a bankrupt. On September 30, 1907, the Union Maid Tobacco Company was adjudged a bankrupt and thereafter W. R. Thrall was elected trustee and brought this action. Prior to the bringing of this suit, cause No. 137989 was commenced by the Cincinnati Gunning Company, a creditor of the Union Maid Tobacco Company, against the same defendants as are here made defendants, and as before stated, for the same purpose—to enforce the payment of stock subscriptions.

A demurrer is interposed in this case, since the consolidation of the cases, to the petition and amended petition of the Cincinnati Gunning Company in case No. 137989 on the ground that the allegations do not state facts sufficient to constitute a cause of action, and secondly, on the ground that the court has no jurisdiction of the action.

The two causes having been consolidated, the court may consider all the pleadings in both cases to determine the merits of the demurrer, inasmuch as the demurrer searches the entire record. 1 Bates' Pleading 428; *Columbus, S. & C. Ry. v. Mowatt*, 35 Ohio St. 284.

While it is undoubtedly true that the Cincinnati Gunning Company could have brought and maintained its action, if no bankruptcy proceedings had intervened, nevertheless, upon the appointment of W. R. Thrall, trustee, in the bankruptcy proceedings, the title to the claims sued upon in these two sections vested by operation of the bankruptcy act (Sec. 70-6) in him and him alone.

This is a right of action arising upon a contract—the contract of subscription for the stock of the Union Maid Tobacco Company. Even if the suit of the Cincinnati Gunning Company had been brought before any steps had been taken in the bankruptcy court, nevertheless, upon the subsequent appointment of the trustee in bankruptcy, the title to his claim would vest in him as of the date the Union Maid Tobacco Company was adjudged a bankrupt, and in such a case the

trustee could have intervened and asked the court to be substituted in place of the plaintiff as the real party in interest.

In the case at bar, the Cincinnati Gunning Company had no right to commence the action brought in this court, under case No. 137989, as it was not vested with the title to the claim, nor the right to bring the suit, but that title and right were vested in W. R. Thrall, trustee.

By the provisions and requirements of Sec. 47-2 of the bankruptcy act, it was and is the duty of the trustee to collect and reduce to money the property of the estate, etc.

For this purpose he, and he alone, has the right to maintain an action such as the one at bar and the one involved in case No. 137989. He acts for all the creditors and is vested with the legal title and right to maintain the action. Even if the Cincinnati Gunning Company should prosecute its action to a final judgment, that judgment would necessarily operate, and be, for the equal benefit of all the creditors of the bankrupt, and fruits of the judgment would be administered by the trustee in bankruptcy.

For the reasons stated the demurrer will be sustained on the ground that the petition and amended petition on a view of the entire record does not state facts sufficient to constitute a cause of action in the Cincinnati Gunning Company against the defendants.

EXECUTORS AND ADMINISTRATORS—GAS AND OIL.

[Knox Common Pleas, 1909.]

JOSEPH S. BREECE ET AL. EXRS. V. ELIZABETH BREECE ET AL.

ROYALTIES OF OIL WELLS PAYABLE TO LIFE TENANT UNDER WILL.

Royalties from gas and oil wells, upon the death of the lessee, having devised a life estate in the lands of his widow, remainder to his son, are payable to the life tenant as the owner of the lands, and regardless of the fact as to whether they were drilled before or after his death; they are not assets payable to his executor or administrator.

[Syllabus approved by the court.]

W. H. Thompson, for plaintiffs.

WICKHAM, J.

On February 23, 1901, Adam G. Breece, a resident of Knox county, Ohio, made his last will. By this will the testator devised to his wife, Elizabeth Breece, a life estate in the farm of 121 acres owned by him in fee simple, with the remainder to his son, Cassie Breece.

On March 25, 1902, the testator executed and delivered to one P.

Parker, and his assigns, an oil and gas lease on 121 acres, by the terms of which lease he granted all the oil, gas, etc., for the term of twenty years, and so long thereafter as oil or gas is found in paying quantities thereon. Afterwards, and before the death of Adam G. Breece, Parker assigned the lease to the Ohio Fuel Supply Company, a corporation organized for the purpose and engaged in the business of producing and marketing natural gas. The lease provided for the payment of \$200 per year for each gas well drilled on the land.

On May 20, 1904, Adam G. Breece died, leaving his said will in full force and effect, and seized in fee simple of the land bequeathed in said will to his wife, Elizabeth, for her life, with the remainder to his son Cassie.

After the death of the testator the gas company drilled a well on the farm of 121 acres, in which the widow, Elizabeth, has a life estate, and which well ever since it was drilled in has been a producer of natural gas in paying quantities, and the gas company has paid a royalty of \$200 per year to the executors of the last will of Adam G. Breece.

This petition is filed by the executors under the statute for a direction of the court where the money now in their hands and received by them from the gas company should be paid, whether to the widow, Elizabeth, or to the remainder-man, Cassie, and the case is submitted to the court on a statement of the foregoing facts.

The owner of a life estate in lands cannot drill oil or gas wells nor open mines upon the land, nor can he grant the right to another to do so. *Kenton Gas & Elec. Co. v. Dorney*, 9 Circ. Dec. 604 (17 R. 101, 105); also *Marshall v. Mellon*, 179 Pa. St. 371 [36 Atl. Rep. 201; 35 L. R. A. 816; 57 Am. St. Rep. 601]; *Gerkins v. Kentucky Salt Co.* 100 Ky. 734 [39 S. W. Rep. 444].

But a life tenant may operate oil wells or mines that have been opened before the creation of the life estate or the death of the testator, where the life estate is created by law, and take the royalty, rentals and profits therefrom. *Brooks v. Hanna*, 10 Circ. Dec. 480 (19 R. 216); *Lemfer v. Henke*, 73 Ill. 405 [24 Am. Rep. 263]; *Priddy v. Griffith*, 150 Ill. 506 [37 N. E. Rep. 999]; *Moore v. Rollins*, 45 Me. 493; *Kier v. Peterson*, 41 Pa. St. 357, 361; *Shoemaker's Appeal*, 106 Pa. St. 392.

In the case of *Koen v. Bartlett*, 41 W. Va. 559 [23 S. E. Rep. 664; 35 L. R. A. 128; 56 Am. St. Rep. 884], and in the case of the *Woodburn's Estate*, 138 Pa. St. 606 [21 Atl. Rep. 16; 21 Am. St. Rep. 932], it is held that where oil wells had been drilled in the testator's lifetime under a lease, and one was being drilled when he died, that the life tenant was entitled to the royalties under the lease.

On a review of these authorities the circuit court of Cuyahoga

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county, in the case of *Brooks v. Hanna, supra*, page 489, was moved to say:

"The Pennsylvania cases are where the one taking the income was given a life estate, the remainder-man taking what was left at the end of the life estate.

"And those cases follow the law as laid down by all the authorities, that where mines are opened at the time that the will takes effect, the life tenant gets the right to work the mines during the time of her life estate; and the same is true of quarries, sand-beds, of gravel and of clay, and if the will, by which the life estate is created, provides that mines are to be opened by the trustee and worked, the life tenant is to have the profits arising from the working of the mines, and the remainder-man only gets such coal or other material as is not worked out during the life estate. The principle on which this is held in the Pennsylvania cases we apprehend is this: That if the mine is opened at the time of the death of the testator and in operation, that the clear intent of the testator is that they shall continue to be worked; and if he provides in his will that they are to be opened and worked, then that is an appropriation by him in his will that so much of the coal or other material beneath the surface as shall be worked during the time of the life estate shall go to the life tenant so far as there shall be net earnings from such mine. And, in such cases, the will in and of itself gives to the life tenant the profits of the mine, and gives to the remainder-man only what is left at the death of the life tenant."

It may, with equal reason and force be said, that where the owner of land in fee simple has executed a lease and granted the right to operate for oil and gas on lands which he has devised to his wife for life, or which he may afterward devise to her for life; it is his intention that the terms of his contract of lease be carried out after his decease and the rentals and royalties to be paid under the lease shall be paid to his wife, who is to be the life tenant of the lands after his death.

The testator has made a contract which in contemplation of law may be carried into effect after his decease. He is presumed to have that knowledge, and in case of his death before the termination of the contract it must be presumed that he intends all that legally results from his act of executing the contract. The lessee has a right to drill and operate the lands for oil and gas. The rental or royalties must be paid by the lessee to the owner of the lands, and the owner of the lands is the owner of the life estate, and it is he who is entitled to such royalties and rents. There is no difference in the rights of the parties whether the wells are drilled before or after the creation of the life estate. If they are drilled after the life estate begins, under a contractual right which arose before the creation of the life estate, it is to all intents and for all purposes the same as if the wells were drilled

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in the lifetime of the testator. Or, to put it in another form, the life tenant takes the land with the right to the royalties of all wells drilled on the land at the time it is taken, and all wells that may be drilled on the land under the contract existing at the death of the testator. *Seagar v. McCabe*, 92 Mich. 186 [52 N. W. Rep. 299; 16 L. R. A. 247]. In *Willford v. Heimhoffer*, 25 O. C. C. 748 (2 N. S. 369), it is held:

"The widow is entitled to the oil produced from land generally assigned and confirmed to her as dower, although the wells are sunk and the oil produced after her husband's death.

"The entry of a judgment cutting off the widow's rights to oil produced from land therefore regularly assigned and confirmed to her as dower in a partition proceeding is *coram non judice* and void when the widow, under the terms of an oil lease entered into between the heirs and herself prior to the commencement of the partition proceeding, is entitled to the oil produced therefrom, and her rights under such lease were not involved or made an issue in such proceeding; and a purchaser at the partition sale takes subject to the right of the widow to the oil under such lease.

We conclude upon a review of the authorities upon the question that the widow is clearly entitled to the royalties now in the hands of the executors. They are no part of the assets of the estate of Adam G. Breece. The gas company should have paid them directly to the widow instead of to the executors, and not being assets of the estate does not make a case for a direction of the court as to how the money shall be disposed of by the executors, and for that reason the petition of the plaintiffs is dismissed at their costs.

CONSTITUTIONAL LAW—COURTS—VEHICLES.

[Greene Common Pleas, March 8, 1909.]

PERRY W. HOBLIT v. G. HARRIES GORMAN.**1. MOTION TO VACATE SUMMONS RAISING MERITS OF CASE OVERRULED.**

A motion to vacate summons for want of jurisdiction of the defendant, in that the case pleaded does not come within the motor vehicle act (99 O. L. 538) under which the action is brought, being in effect a demurrer, raises consideration of the merits of the case; and, notwithstanding it might then be too late to raise the question of jurisdiction, the motion will be overruled.

2. DISCRIMINATION BETWEEN PERSONS RESPECTING TRIAL OF ISSUES.

The general assembly has no power to discriminate between persons, or classes, respecting the right to invoke the arbitrament of the courts in the adjustment of their respective rights.

3. MOTOR ACT SECTION FIXING VENUE IS UNCONSTITUTIONAL.

Section 33 of "an act to provide for the registration, identification and regulation of motor vehicles" (99 O. L. 538), which provides that "all actions for injury to the person or property, caused by negligence of the owner of any automobile, included within the provisions of this act, may be brought by the party injured against the owner of such automobile in the county wherein such injured party resides," is an arbitrary, unjust and unreasonable classification, creates a burden and subjects a class of citizens, only, to certain liabilities and requirements to respond to a suit in any county in the state, which is required of no other class, and is a denial to them of the equal protection of the law, and such provisions in said act are, therefore, unconstitutional and void.

[Syllabus approved by the court.]

Daniel Nevins and H. B. Cramer, for plaintiff:

Cited and commented upon the following authorities. 19 Enc. Pl. & Pr. 710; *Greer v. Young*, 120 Ill. 184 [11 N. E. Rep. 167]; *Christian Educational Soc. v. Varney*, 54 N. H. 376; *Bliss v. Railway*, 24 Vt. 428; *Mabon v. Electric Co.* 24 App. Div. 50 [48 N. Y. Supp. 973]; *Kennard v. Railway*, 1 Phil. (Pa.) 41; *Goodrich v. Hamer*, 8 C. L. B. 11.

Gottschall & Turner, for defendant:

That the act is unconstitutional. *Willyard v. Hamilton*, 7 Ohio (pt. 2) 111 [30 Am. Dec. 195]; *Yeazill v. State*, 10 Circ. Dec. 794 (20 R. 646); *Coal Co. v. Rosser*, 53 Ohio St. 12 [41 N. E. Rep. 263; 29 L. R. A. 386; 53 Am. St. Rep. 622]; *State v. Hogan*, 63 Ohio St. 202 [53 N. E. Rep. 572; 52 L. R. A. 863; 81 Am. St. Rep. 626]; *State v. Gravett*, 65 Ohio St. 289 [62 N. E. Rep. 325; 55 L. R. A. 791; 87 Am. St. Rep. 605]; *Palmer v. Tingle*, 6 Circ. Dec. 709 (9 R. 708), affirmed, *Palmer v. Tingle*, 55 Ohio St. 423 [45 N. E. Rep. 313]; *State v. Harmon*, 13 Circ. Dec. 292 (3 N. S. 399); *State v. Schmuck*, 77 Ohio St. 438 [83 N. E. Rep. 797; 14 L. R. A. (N. S.) 1128; 122 Am. St. Rep. 527]; *Williams v. Donough*, 65 Ohio St. 499 [63 N. E. Rep. 84; 56 L. R. A. 766]; *Inwood v. State*, 42 Ohio St. 186; *Thomas v. Ashland (Vil.)*, 12 Ohio St. 124; *State v. Perry Co. (Comrs.)* 5 Ohio St. 497.

KYLE, J.

The plaintiff seeks to recover damages claimed to have been sustained and occasioned by the negligence of the defendant in the operation, control and management of his automobile, in the sum of \$117.75.

Summons was issued to the sheriff of the county of Montgomery, and service duly made upon the defendant in said Montgomery county, as provided for in Sec. 33 of an act to provide for the registration, identification and regulation of motor vehicles. 99 O. L. 538.

The defendant now comes, without entering his appearance in this action, and without submitting himself to the jurisdiction of this court, but appearing for the purpose of his motion only, and moves the court

to set aside the service of summons because the court has no jurisdiction over the person of the defendant.

The motion to vacate the summons is based upon two grounds:

First. That the case pleaded does not come within the act.

Second. That the act is unconstitutional.

As to the first ground the reason stated is, in effect, a demurrer to the petition. Whether or not the petition is open to a motion to make more definite and certain need not here be determined. The merits of the case on the petition could only be considered, after the defendant has come into court, and whether or not that would be too late to raise the question of jurisdiction is one of the complications that arises by reason of this peculiar provision of the law. It would probably be the duty of the court if, upon the final determination of the case, the fact of the negligence of the defendant was not established, so as to bring the case within the provisions of Sec. 33, to direct a verdict for the defendant, if the defendant had continued to protest the jurisdiction of the court.

The motion on the first ground claimed should be overruled.

The determination of whether or not the second ground—that is, that the act is unconstitutional under which this case is brought—is more difficult of satisfactory solution.

It is claimed by the plaintiff that the question as to the court's jurisdiction cannot be raised on motion to set aside the service, but should be raised on answer or demurrer.

"In order to enable a defendant to object to the jurisdiction of the court over his person, the objection must be made at the earliest opportunity of the party." *Long v. Newhouse*, 57 Ohio St. 348 [49 N. E. Rep. 79].

The question sought to be raised by the defendant, by his motion, is the constitutionality of the section which permits service of summons to be made in another county, and while possibly the question of the constitutionality of Section 33 should be raised by overruling the motion to set aside service of summons, and the defendant submitting a general demurrer upon the ground that the court has no jurisdiction over the person of the defendant, yet, for the purposes of this case the court will undertake to determine this question as to the constitutionality of that act upon the motion under consideration.

"A statute that imposes a restriction on one citizen, or class of citizens, only, denies to him, or them, the equal protection of the law." *Coal Co. v. Rosser*, 53 Ohio St. 12, 23 [41 N. E. Rep. 263; 29 L. R. A. 386; 53 Am. St. Rep. 622].

This proposition might be stated in another form—that a statute which creates a burden and subjects one citizen, or class of citizens only, to certain liabilities and requirements, to respond to a suit in any

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county in a state, which is required of no other class, is a denial to them of the equal protection of the law.

If Sec. 33 had provided that all persons operating motor vehicles should be liable to a suit in any county in the state where the injured party might reside, as defined by Sec. 1, then it would be to determine whether from the exceptions made in Sec. 1, there was an arbitrary and unjust discrimination. But Sec. 33 provides that the owner of an automobile only may be subject to a suit for negligence in any county within the state where the injured party might happen to reside.

That the owner of one kind of motor vehicle should be held to respond for damages different from that of the owner of another kind of motor vehicle, seems to be an unjust discrimination without any reason or basis. And the argument might be carried further. Why should one party, injured by a motor driven vehicle, through the negligence of the owner, have any greater privilege in enforcing his action for damages than if he were injured on the highway by a horse and buggy, or wagon or any other vehicle driven by motor power, or horse power, which has an equal right upon the public highway. There would be just as much reason to say that a man who was injured by a two horse carriage should have certain rights of action for damages in case of injury from negligence, that would not be given to a one horse buggy, through an accident of the same character.

It seems to me that the proposition is determined in *Coal Co. v. Rosser, supra*, page 24:

"We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective rights."

It is my judgment that the classification and discrimination made by the provisions of Sec. 33 as regards the proceedings against the owner of any automobile for negligence, is arbitrary and unjust, and is a classification which is not founded upon good reason.

Any unjust and arbitrary classification in legislation which imposes an unjust burden upon any single class of citizens is a depriving of them of due process of law under the constitution, and the same is not the law of the land, and the legislature was without power to enact such legislation, and the same is unconstitutional and void.

And it being my opinion that the provisions of Sec. 33 of the motor vehicle act is unconstitutional and void, and said section being the section which provides for the summoning of the defendant in this action to answer in a county other than the county of his residence, the motion to set aside the service in this case should be sustained.

WILLS.

[Hamilton Common Pleas, February 13, 1909.]

JOSEPH W. O'HARA, ADMR., ETC., v. CHARLES PEIRANO ET AL.

1. DEVISE "IN FEE SIMPLE" MODIFIED BY SUBSEQUENT PROVISION TO LIFE ESTATE.
A devise of testator's property to his wife "absolutely and in fee simple" is modified by a provision in a subsequent item providing that "in case my wife should die leaving said estate unconsumed, I desire that the same shall be distributed" to the payment of certain legacies mentioned, and gives the wife a life estate only with the right to consume the whole or part of the estate during her lifetime.
2. "DESIRE" IS A DISPOSITIVE WORD IN WILL.
"Desire" in the phrase "I desire that the same shall be distributed" referring to testator's estate, is dispositive and conveys a vested estate.
3. LEASE EXECUTED BY LIFE TENANT HELD EFFECTUAL AFTER THE DEATH.
A widow, under a devise of a life estate with power to consume the whole or part of her deceased husband's estate, has power to execute a lease which is effectual after her death.

[Syllabus approved by the court.]

J. W. O'Hara, for plaintiff.

Clore, Dickerson & Clayton, for defendants.

SWING, J.

In this case I am called upon to construe the will of John Podesta, deceased, in certain respects.

The action is brought by plaintiff as administrator with the will annexed for a decree for the sale of real estate left by said John Podesta, deceased, for the payment of certain money legacies set forth in the third item of the will. This involves the question of the true intention of the testator as expressed in the second and third items of the will as read together.

The first item of the will provides for the payment of the just debts of the testator, and the erection of a monument to the memory of himself and wife to cost \$500.

The second item of the will is as follows:

"Second. I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, to my wife, Mary Podesta, absolutely and in fee simple."

The third item is, in part, as follows:

"Third. In case my wife should die leaving said estate unconsumed I desire that the same shall be distributed as follows: To Caroline Peirano six thousand (\$6,000) dollars," and then follow many other like legacies varying in amounts, to different persons, the money legacies amounting in all to about \$15,000, the several legacies being

for sums of \$6,000, \$1,000, \$500, \$100 and \$50 respectively, there being several bequests of the said several sums below \$6,000.

Mary Podesta, wife of the testator, died after the death of the testator and after the probate of the will.

It is claimed by certain of the defendants, the heirs at law of said Mary Podesta, wife of the testator, that by the true construction of the will the said Mary Podesta took the fee simple title to the real estate of the testator, which plaintiff seeks in this action to have sold for the payment of the money legacies set forth in the third item of the will, and that the real estate cannot, therefore, be sold for the payment of said money legacies.

I am of opinion that this is not the true intention of the testator as gathered from the reading of all the items of the will together. I am of opinion that the intention of the testator was to give to his said wife, Mary Podesta, a life estate in his estate for her own life, with the right to consume the whole or a part of the estate during her life; and that if she left any part of the estate unconsumed at her death, it should be devoted to the payment of the several money legacies.

Such construction I think is clearly in accordance with the manifest intention of the testator and in accordance with established rules of construction of wills. A contrary construction would mean that no effect should be given to the third item of the will. It is true that the second item purports to devise the estate to the wife "in fee simple." It is true also that the words "in fee simple" are not in themselves words of uncertain meaning. But technical legal expressions are sometimes used in wills with an incorrect idea of their meaning on the part of the testator. It is also true that positive dispositions are sometimes made in one item of a will, and modified in subsequent items of the will.

In Redfield, Wills, Sec. 426, it is said:

"It seems clear that a technical construction of words and phrases, although *prima facie* the one which should prevail, will not be carried to the extent of defeating any obvious general intention of the testator, since wills are often prepared by those wholly unacquainted with the precise technical force of legal formulas, and who from a consciousness of such deficiency, often exert themselves to drag in such phrases, wherever they suppose they would probably have been adopted by an experienced draughtsman."

There have been many cases of the improper use in a will of legal terms which have a fixed, certain meaning.

In Redfield, Wills, 446, Sec. 445, it is said:

"The rule seems to be pretty clearly established that where the testator makes a general devise, or bequest, which would include the

whole of the estate, and in other portions of the will makes specific dispositions, these shall be regarded as explanations, or exceptions, out of the general disposition; and it will not be important in such case whether the general or the special provisions come first in order, since, in either case, the general disposition will be regarded as made subject to the more specific ones."

These rules are supported by many authorities cited by counsel for plaintiff in his briefs, in Ohio and elsewhere, and, I take it, are not doubtful. I cannot disregard and treat as of no effect the words of the third item of the will:

"In case my wife should die leaving said estate unconsumed, I desire that the same shall be distributed as follows:" and the many specific legacies which then follow.

It is contended that the word "desire," in the third item of the will, is not clearly and conclusively dispositive; that it does not necessarily express a purpose of the testator which must be carried out to the extent of requiring a modification of the clearly expressed intention in the second item. This contention I think is not correct.

In the case of *Brasher v. Marsh*, 15 Ohio St. 103, it is said in the syllabus:

"That the clause expressing the 'wish and desire' of the testator was dispositive in its nature, and gave a vested interest to all the children."

I do not think it necessary to quote other authorities in this connection. I think it clear from the will in this case that the word, "desire," as used by the testator, is dispositive.

Counsel on both sides have cited many authorities in their briefs on various phases of the questions submitted to me, but I do not deem it necessary to discuss or quote them further.

I am satisfied the construction of the will which I have stated at the outset of this opinion is according to the intention of the testator as it must be gathered from the whole will. A decree for sale may therefore be taken, as prayed for in the petition.

There is a lease which was given by said Mary Podesta, wife of testator, in her lifetime, which I will hold to be effectual, and the interests of the lessee, under the terms of his lease, will be protected, as I am disposed to hold that under the construction which I have given to the will, the said Mary Podesta had the power to execute the lease, and I understand that no serious contention is made as to that by counsel for any of the parties to the suit.

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ARREST—CRIMINAL LAW—INDICTMENTS.

[Lawrence Common Pleas, June 4, 1909.]

STATE OF OHIO V. FRANK WARD

BASTARDY NOT OFFENSE TO SUSTAIN INDICTMENT FOR RESCUE FROM OFFICER.

An indictment charging a defendant with having rescued another who was in the lawful custody of a constable under a warrant issued by a justice of the peace in bastardy proceedings, is insufficient under Sec. 6903 Rev. Stat., because the person so rescued was not charged with an "offense."

[Syllabus by the court.]

DEMURRER to the indictment.

T. D. Shirkey, for defendant.

J. C. Riley, Pros. Atty., for plaintiff.

CORN, J.

This is a prosecution under Sec. 6903 Rev. Stat., which provides that,

"Whoever, having lawfully the custody of a person charged with or convicted of an offense, voluntarily suffers such prisoner to escape and go at large, and whoever rescues such prisoner by force from the custody of such person, or from a jail, or any place of confinement, shall be fined not more than five hundred nor less than fifty dollars or imprisoned not more than three months, or both."

The indictment was returned by the grand jury at the present term of this court and charges in substance that one Charles Edwards, a justice of the peace of this county, upon a complaint in bastardy filed before him, had issued his lawful warrant to any constable of this county commanding him to take one John Ward, and have the body of him, the said John Ward, forthwith before the said justice, averring that the said John Ward was charged with bastardy upon the complaint in writing filed by one Maggie Fuller, and that the indictment charges the defendant, Frank Ward, with unlawfully and violently assaulting the constable and his assistant who had arrested the said Ward, and unlawfully and by force rescuing and setting at large from the custody of said constable the said John Ward.

To this indictment a general demurrer has been filed and in argument counsel for the defendant raises two points; the first is in reference to the averment in the indictment that the said John Ward, whom the indictment charges that Frank Ward rescued, was in the custody of Lee Singer who is designated in the indictment as a regularly deputized assistant constable, claiming that there is no such office in this state. It is sufficient to say in reference to that argument that the indictment

charges that the warrant was delivered to John Smith, one of the constables of this county, and that John Smith, the constable aforesaid, did take and have the said John Ward in his custody together with a regular deputized assistant constable, Lee Singer. A constable has a right to select an assistant and it is immaterial by what term that assistant is designated, and upon this point the demurrer is not well taken, because it sufficiently appears from the indictment that the constable, a regularly authorized and qualified constable, did make the arrest and had this man in his custody, together with an assistant, Lee Singer.

The other point raised in argument is that the said John Ward named in the indictment and who it is claimed was forcibly rescued was not charged with, nor convicted of, an offense.

It is well known that penal statutes must be strictly construed. This section under which the indictment was returned provides that the person who is rescued must be either charged with, or convicted of, an offense.

The indictment charges that the warrant had been issued upon a complaint in bastardy upon the oath of Maggie Fuller, and it will be observed that it is not stated in this indictment that Maggie Fuller was an unmarried woman, which is necessary in all proceedings in bastardy; that is to say, that bastardy proceedings can only be instituted upon the oath of an unmarried woman.

But as I was about to say the warrant was issued upon a complaint in bastardy and the arrest was made upon that warrant and it is argued on behalf of the defendant that John Ward was not charged with an offense as required by Sec. 6903 Rev. Stat. This raises the very interesting question: What is the meaning of the word "offense" as used in this section of the statutes?

Bouvier in his law dictionary defines the word offense as "doing that which a penal law forbids to be done or omitting to do what it commands; in this sense it is nearly synonymous with crime. In a more confined sense it may be considered as having the same meaning as misdemeanor, but it differs from it in this: that it is not indictable but punishable summarily by forfeiture or a penalty."

In Vol. 6 of "Words, Phrases, and Clauses Judicially Defined" beginning on page 4915 is found a definition of the word "offense" from various jurisdictions in the United States: "An offense in its legal signification means the transgression of a law," citing, *Moore v. Illinois*, 55 U. S. (14 How.) 13 [14 L. Ed. 306], and two cases from the state of New York: "As synonymous with the word 'offense' Webster gives misdemeanor, transgression, delinquency," citing, *State v. Walbridge*, 119 Mo. 383 [24 S. W. Rep. 457; 41 Am. St. Rep. 663].

In the case of the *State v. West*, 42 Minn. 147 [43 N. W. Rep. 845],

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it is held: "The terms 'crime,' 'offense,' and 'criminal offense' are held to be synonymous and are ordinarily used interchangeably, and include any breach of law established for the protection of the public as distinguished from an enforcement of mere private rights."

In *Illies v. Knight*, 3 Tex. 312, it is held as follows: "An offense is defined to be an act committed against the law, or omitted where the law requires it, and punishable by it; and where the statute speaks of a party as having committed an offense we understand a crime, and when it employs the words 'crime' and 'offense,' we understand these as mere synonymous terms or as an expression of different degrees of crime. To commit an offense is in legal parlance to be guilty of crime. The words 'crime' and 'offense' are used in the law books as convertible terms and the latter word is often employed by them in the common and under our statute law as crime of every degree."

General statutes of Kansas: "The word 'offense' means any act or omission for which the law of this state prescribes a punishment."

The statute of Miss., Sec. 1511: "The term 'offense' when used in any statute shall mean any violation of law liable to punishment by criminal prosecution."

The code of West Virginia provides: "The word 'offense' includes every act or omission for which a fine, forfeiture, or punishment is imposed by law."

The code of New York provides: "The term 'offense' when used in any statute is to be construed to mean any offense for which any criminal punishment may be inflicted," citing, *Behan v. People*, 3 Parker's Crim. Rep. 686.

The code of Texas provides: "An offense is an act or omission forbidden by positive law and to which is annexed, on conviction, any punishment prescribed in this code."

These references give a pretty good idea of what the codes and decisions of various states regard as the meaning of the word "offense."

Now, it appears from this indictment that Frank Ward, the defendant, is charged with rescuing John Ward who was in the custody of the constable upon a warrant in a bastardy proceeding and the question which arises is, "Is a person arrested in a bastardy proceeding charged with an 'offense' as contemplated by Sec. 6903?"

In Vol. I, Words and Phrases Judicially Defined, page 718, it is said, "Bastardy proceedings are to be regarded as essentially a civil action accompanied by the extraordinary remedy of arrest and imprisonment for the purpose of enforcing judgment rendered in the case"; and on the same page it is said "Proceedings in a case of bastardy may not be considered as penal but only as a means to enforce the discharge of legal obligations."

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In the case of *Devinney v. State*, Wri. 565: Judge Wright uses this language: "This prosecution," (meaning a bastardy proceeding), "is *quasi*-criminal but not strictly so, and if conducted in the name of the state at all it should appear to be on the relation or complaint of the real party. We think it would be more proper to carry on the suit in the name of the party complaining."

And in the same case it is said that the state is in no way interested in it, that the prosecuting attorney is not bound to attend such suits, etc.

Now, bearing in mind what Judge Wright has said, that it would be more proper to carry on the suit in the name of the party complaining, and that the state is not interested in the suit, and that it is only *quasi*-criminal, we refer to Art. 4, Sec. 20, of the constitution of Ohio which provides that all prosecutions shall be carried on in the name and by the authority of the state of Ohio, and Sec. 1273 Rev. Stat. provides that the prosecuting attorney shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, thus clearly showing that a bastardy proceeding is not a criminal proceeding.

In the case of *Perkins v. Mobley*, 4 Ohio St. 668, 673, the Supreme Court say:

"In many of the states, begetting a bastard child is made an offense, and punished by indictment; but in this state it is not so. The proceeding here is not strictly civil nor criminal. It neither punishes a crime, nor gives redress for a civil injury. It is simply a statutory remedy to enforce a high moral duty; and the moral duty is enforced to prevent a burden, which ought to rest upon the father, from falling upon the public. It may be instituted upon the complaint of the mother, or if she neglects it, or fails to prosecute to effect, by the proper public authorities. At one point in the proceedings a settlement may be made."

In the case of *Carter v. Krise*, 9 Ohio St. 402, 405:

"It is certainly true, that none of the forms and modes of proceeding under our bastardy act are analogous to proceedings in criminal cases. And yet the most of the incidents to such a proceeding are such as belong to proceedings strictly civil. It is, or may be, prosecuted in the name of a private party only—the mother of the child, or the township trustees. On a bond of indemnity being given that the child shall not become a public charge, the proceeding may be compromised and discharged by the mother of the child. It is prosecuted neither by information, nor indictment. It is no part of the duty of the attorney for the state to prosecute it. The defendant after conviction is entitled to all the benefit of the act for the relief of insolvent debtors; and, I sup-

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pose, it will not be claimed that at any stage of the proceeding he can be the subject of pardon by the executive.

"But, after all, this question can properly be determined only by looking into the essential nature, aim and object of the proceeding. Does it aim to *punish* the defendant? or is it in its nature simply a remedy to enforce the discharge of a civil and moral duty? It is clearly the latter, and that only. It is the duty of every man who becomes the father of a child, to contribute to its support and to save the public from the burden of its maintenance. This duty the statute aims to enforce. There is nothing punitive about it.

"If any crime be involved in the accusation against the defendant, it must consist in the act of illicit intercourse by which the bastard child is begotten; and of this crime the parties are equally guilty whether paternity do or do not result; and yet, by our law, there is no crime where there is no paternity, unless the parties *live* and cohabit in a state of adultery or fornication, and then they may be prosecuted under another statute, by information or indictment, and punished by fine and imprisonment."

Following the same line is the case of *Musser v. Stewart*, 21 Ohio St. 353, 356:

"This is not a suit to recover a sum of money owing from the defendant to the complaining party. The liability sought to be enforced is not founded upon contract express or implied, but originates in the wrongful act of the defendant, against the consequences of which the statute is designed to protect the public.

"Proceedings under the statute are only authorized in cases where the mother of the child is a resident of this state and the child is thus subject to become a public charge. If she neglects to prosecute, the public authorities of the locality liable to be charged with its support, may do so, unless security is given to save them from such liability.

"The statute is in the nature of a police regulation. Its main object is to furnish maintenance for the child, and indemnity to the public against liability for its support. The act of the putative father is regarded as an offense against the peace and good order of society; and the penalty which the law imposes for his transgression, is to enforce upon him the duty of making provision for the maintenance of his illegitimate offspring.

"The sum in which the defendant is ordered to stand charged for the support of the child, is not imposed as an unconditional liability. It is a provision by way of security. If the child dies, the order of maintenance, as to the future becomes inoperative."

This decision is the only one I have found in which the word "offense" is used in connection with a proceeding in bastardy, and it is

used in such a way as to indicate that it does not contemplate a criminal offense; it is an offense against the peace and good order of society.

It will be seen from these different authorities that there is a vast difference between a criminal prosecution and a proceeding in bastardy. I need only call your attention to the fact that in bastardy proceeding the rules of evidence are different from the rule in a criminal case. It is well known that in a criminal case the defendant must be proven guilty beyond a reasonable doubt, while in the other proceeding the complainant is only required to prove the truth of her complaint by a preponderance of the evidence.

So the conclusion that I have reached in the light of these authorities is that John Ward when he was in the custody of the constable under this complaint in bastardy was not charged with an "offense" as contemplated by Sec. 6903 Rev. Stat., and that, therefore, Frank Ward, the defendant, if he did rescue him from the constable, did not violate the provisions of Sec. 6903. The demurrer will therefore be sustained and the defendant discharged.

ARMY—COURTS—HABEAS CORPUS—MILITIA—PARENT AND CHILD.

[Cuyahoga Common Pleas, April 30, 1909.]

JOSEPH KUCHTA, IN RE.

1. MINOR BECOMES SOLDIER BY ENLISTMENT.

A minor, entering into a contract of enlistment with the Ohio National Guard, and receiving pay under said contract from the government, becomes a soldier subject to the duly authorized rules and regulations of the organization.

2. PARENT CANNOT MAINTAIN HABEAS CORPUS TO OBTAIN CUSTODY OF MINOR CHILD FROM JURISDICTION OF MILITARY COURT.

The application for a writ of habeas corpus by a parent claiming the exclusive custody and control of such person will be refused, notwithstanding his minority, and notwithstanding the fact that the parent did not give his written consent to such enlistment, said minor being under arrest on charges over which the military court has jurisdiction.

3. CONTRACT OF ENLISTMENT OF MINOR VOIDABLE BEFORE COMMISSION OF OFFENSE OR AFTER SENTENCE.

Such a contract of enlistment is voidable by the parent any time before the commission of the offense or after sentence served, but not otherwise.

4. CIVIL COURTS WILL NOT INTERFERE WITH MILITARY JURISDICTION.

Civil courts will not interfere in matters over which the military tribunals have jurisdiction.

[Syllabus by the court.]

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Toland & Pearson, for applicant.

Myler & Turney, contra.

KEELER, J.

This action for a writ of habeas corpus is brought by Joseph Kuchta, the father of William Kuchta, a minor.

It is claimed by the father that his son is unlawfully imprisoned and restrained of his liberty by the sheriff of this county. The return of the sheriff shows that the said William Kuchta is committed to his custody as an enlisted man of the Ohio national guard by Captain Arthur S. Houts, fourth infantry Ohio national guard, and that he holds him simply as the agent of the military authorities. No complaint is made as to the formality or regularity of the commitment.

The record and evidence disclose the fact that the said William Kuchta did, in June, 1908, voluntarily make application for enlistment in the Ohio national guard, representing himself at the time to be twenty-one years of age; that he was inspected by the recruiting officer, passed the medical examination, took the oath, became enlisted, and received pay as a soldier from the government. He accompanied the fourth infantry, as a member, to a certain encampment held in Indiana, to and from which his transportation and expenses were paid by the government, and was otherwise identified with the organization as a member and soldier.

At the time he enlisted his father, Joseph Kuchta, was not aware of what his son had done in this respect, and did not ascertain the fact until some three months afterwards, or some six months prior to the beginning of this action.

The father bases his right to the writ upon the ground that his son, at the time he enlisted, was a minor, being of the age of about seventeen years; that he, his father, at no time gave his consent to the enlistment, and that he alone is entitled to his custody and control.

Plaintiff relies on Sec. 3023 Rev. Stat., which provides that, the militia of the state is divided into two classes, to wit, the organized militia known as the Ohio national guard and the Ohio naval militia, and the reserve militia; and that every able-bodied male citizen who is more than eighteen and less than forty-five years of age shall be enrolled in the militia and perform military duty, etc. He claims that by virtue of that statute his son did not become, as a matter of law, an enlisted soldier; that he could not have committed the offense charged against him, and therefore cannot be punished.

While the statute made every able-bodied male citizen more than eighteen and less than forty-five years of age a member of the militia of the state, and subject to military duty, there was nothing in the statute which made it unlawful for the accused to enlist at the age of

seventeen. Although a minor, as between himself and the Ohio national guard, his contract of enlistment was binding, but voidable either by his father, under proper circumstances, or by the military authorities; but at no time prior to the arrest did the father undertake to exercise his privilege. To be sure, this apparent acquiescence in what his son had done did not amount to such a consent as the law requires, for that consent must be in writing, which consent does not appear from the evidence, and which all parties will concede was at no time given. The fact does remain, however, that if the father was so anxious to relieve his son from any obligation he might be under to the military tribunal, he had plenty of time and opportunity to do so from September, 1908, down until the time this action was begun, a period of some six months. He now comes into court and undertakes to assert a right after his son, as an enlisted soldier, has been placed under arrest for violating some military rule or regulation. I am inclined to think that whatever rights he may have had and did have prior to the arrest will not avail him now, for the reason that conditions have entirely changed.

It is a well-settled principle of law that civil courts will not interfere with the military authorities wherever the latter have jurisdiction of the subject-matter in controversy. There is no doubt in my mind of the jurisdiction of the military court over the acts and conduct of the accused. He was an enlisted soldier; he had received pay as such from the government; and I hold that, notwithstanding the fact that his enlistment was not consented to, and notwithstanding his minority so long as he remained in the service he was amenable to the military law. This court will not interfere, therefore, to discharge him on the petition of his father for a writ of habeas corpus, he being under arrest and held on a charge cognizable by the summary court of the Ohio national guard and the laws of the state. After that military proceeding shall have been terminated, and after the expiration of whatever sentence may be inflicted upon him, his father would be, in my judgment, entitled to assert his rights as to his control and custody, and would have those rights respected not only by the military authorities, but by this court, if necessary. To reason otherwise would be to hold, absurdly, that after committing the offense charged against him, he would be amenable to military jurisdiction only with the consent of his parent; and that the father could defeat the trial by the court martial by opposing the prosecution on the ground of infancy. *Scott, In re*, 144 Fed. Rep. 79 [75 C. C. A. 237]. That his father could release him from his contract of enlistment before arrest or after serving sentence, there is no doubt; but that is a very different thing from obtaining his release and immunity from prosecution for acts committed against law. Being a soldier, he became amenable

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to the military law just the same as, though a minor, he would have become subject to the civil law. His father could not prevent the law's enforcement in either case. Judge Dillon, one of the greatest lawyers living to-day, and in his time a great judge, states, in *Anderson, Ex parte*, 16 Iowa, 595, 599, that, on a charge of desertion, infancy is no defense, and that one thus accused must abide the sentence of a court martial before he can contest the validity of his enlistment. He also states that there would be an end of all safety if a minor could insinuate himself into an army, and, after perhaps jeopardizing its very existence by telling its secrets to the enemy, escape military punishment by claiming the privilege of infancy; and he held that where the return through a writ of habeas corpus shows that the prisoner is held to answer to a charge of a military crime, in which the military courts had exclusive jurisdiction, the civil courts would not *even inquire into the validity of his enlistment*.

As I read the authorities, these principles are laid down in substantially all of them. *Kaufman, In re*, 41 Fed. Rep. 876; *Cosenow, In re*, 37 Fed. Rep. 668; *Zimmerman, In re*, 30 Fed. Rep. 176; *Scott, In re*, 144 Fed. Rep. 79, *supra*; *United States v. Reaves*, 126 Fed. Rep. 127 [60 C. C. A. 675]; *Miller, In re*, 114 Fed. Rep. 838, 842 [52 C. C. A. 476]; *Grimley's Case*, 137 U. S. 147 [11 Sup. Ct. Rep. 54; 34 L. Ed. 636].

The petition for the writ of habeas corpus will, therefore, be denied, and the prisoner remanded to the custody of the military court.

PLEADING.

[Scioto Common Pleas, July 19, 1909.]

MARGARET B. REED v. METROPOLITAN CASUALTY INS. CO.

1. SUFFICIENCY OF PLEADING ON DEMURRER CANNOT BE DETERMINED FROM EXHIBIT ATTACHED TO BUT NOT MADE PART THEREOF.

Upon demurrer, the court cannot look to an exhibit to a pleading attached thereto in accordance with the requirements of Sec. 5085 Rev. Stat., but not made a part of the pleading, to determine either the sufficiency of the pleading, or whether the pleader has correctly interpreted the written instrument and averred accordingly.

2. INTERPRETATION OF WRITTEN INSTRUMENT ATTACHED TO PLEADING RAISED BY APPROPRIATE PLEA OR DEMURRER TO EVIDENCE.

The sufficiency of the pleading must be determined by its own allegations, unaided by the exhibit, and whether the pleader has correctly interpreted his written instrument must be determined upon an issue raised by an appropriate plea, or by objection or demurrer to the evidence upon the ground of variance.

3. EXHIBIT HELD NOT PART OF PLEADING.

A copy of an instrument attached and filed with a pleading under Sec. 5085, is not a part of the pleading, and cannot be looked to on demurrer; but it is intended for the information of the adverse party and as a substitute for oyer under the former practice.

[Syllabus by the court.]

O. W. Newman, for plaintiff.

I. H. Sample and Bannon & Bannon, for defendant.

DEMURRER to the petition.

CORN, J.

The plaintiff in this action sues the defendant upon what is commonly known as an accident insurance policy upon the life of her husband, William L. Reed.

I will call attention only to those parts of the petition which are necessary in order to determine the question submitted to me. It is charged in the petition that on September 26, 1904, in consideration of a certain premium and of certain warranties paid and made by the said William L. Reed, the defendant by its policy or contract of insurance contracted and agreed with the said William L. Reed to insure his life in the sum of \$5,000 for a period of twelve months in case his death resulted, within ninety days, from bodily injuries sustained directly and solely through external, violent, and accidental means; and agreed to pay to the beneficiary named in said policy said sum in the event of the death of the said William L. Reed during the period named resulting within ninety days from bodily injuries sustained directly

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and solely through external, violent, and accidental means. A copy of said policy or contract of insurance is attached to the petition marked "Exhibit A," but it is not made a part of the petition.

It is further alleged that the policy has been kept in force by subsequent payments of premiums, and that on September 14, 1908, and while this policy was in full force and effect, said William L. Reed sustained bodily injuries directly and solely through external, violent and accidental means, to wit, the result of a fall from a ninth floor window of the Havlin Hotel in the city of Cincinnati, Ohio, from which alone death resulted on said date.

The petition otherwise follows the ordinary form of a petition upon an insurance policy, alleging the performance of all the conditions of said policy by the insured and the beneficiary, furnishing of proofs, etc., and demands judgment for the amount which the plaintiff claims is due her by the terms of said contract. The defendant files a demurrer to the petition of the plaintiff upon the ground that the same does not state facts sufficient to constitute a cause of action.

Upon the argument of this demurrer, counsel did not claim that the petition in and of itself was bad upon demurrer, but the claim was made that by an examination of the copy of the policy attached to the petition as an exhibit it would be seen that the pleader had not conformed to the terms of the contract, that is to say, that the plaintiff had not correctly stated her cause of action. Counsel on both sides apparently abandoned the demurrer and argued the question of the construction of a certain clause in the policy as if such clause was properly before the court for a judicial construction; and counsel on both sides are very anxious to have the court give a judicial construction of the clause of the policy in dispute. It is a question of considerable importance to both sides, inasmuch as, it is claimed, the pleading will determine the burden of proof as to whether the injuries were brought about by certain so-called exceptions in the policy.

The clause of the policy in question is, that the defendant "hereby insures the person described in the said warranties against the effects of bodily injuries sustained directly and solely through external, violent, and accidental means, which bodily injuries or effects thereof shall not be caused nor contributed to by, nor in consequence of, any bodily or mental disease or infirmity, or altercation, or intoxication, or wanton exposure to injury, or suicide (sane or insane)."

Counsel for the defendant in argument upon this demurrer asks the court to look at the exhibit and construe this clause of the policy and then require the plaintiff to bring herself within the provision of this clause, as understood by the defendant, by stating and afterwards proving that the injuries resulting in the death of William L. Reed

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were not caused nor contributed to by, nor in consequence of, any bodily or mental disease or infirmity, or altercation or intoxication, or wanton exposure to injury, or suicide, sane or insane.

Counsel for plaintiff in argument also asks the court to examine this exhibit and find and declare that the plaintiff is not required either to prove or plead these matters and maintains that if the defendant desire to rely upon any of them, that constitutes an affirmative defense which must be pleaded by the defendant and that, therefore, the burden of proof to maintain this contention would rest upon the defendant. The plaintiff claims that she has correctly interpreted her contract of insurance and has properly averred thereon; the defendant contends that the contract of insurance under which plaintiff claims is entirely different from that upon which she relies, and as I have stated, counsel ask the court to determine which is the proper construction, that is to say, which party to this action has correctly interpreted the terms of this contract.

The court suggested to counsel at the time of argument that in his opinion the demurrer to the petition, upon the ground stated, did not raise the question sought to be determined; and the court, after a careful examination of the authorities, is still of that opinion; and that to decide the question argued to the court, the action of the court would be outside of the record and wholly gratuitous; if this court were to be the trial court, he would comply with the request of counsel and give counsel his opinion as to the proper construction of this clause in the policy and the proper method of pleading; but the court, being of the opinion that the question sought to be determined properly arises in another way, feels that he ought not to embarrass the trial judge by a construction which might not meet the approval of such trial judge.

The conclusion which the court has reached seems to be supported by the great weight of authority, and especially in Ohio, to some of which authorities the court will now refer.

Phillips, Code Plead. Sec. 371: "A copy when attached as an exhibit being intended for the information of the adverse party and not constituting a part of the pleading can not be looked to on demurrer."

Section 5085 Rev. Stat. (old code, Sec. 117) requires that when the action, counterclaim, or set-off is founded on an account, or on a written instrument as evidence of indebtedness, a copy thereof to be attached to, and filed with the pleading.

And this section includes all instruments in which an action for pecuniary relief is founded or which includes a promise whether conditional or unconditional, to pay a fixed sum, and includes an insur-

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ance policy when sued upon to recover a loss. *Lauer v. Assurance Soc.* 10 Dec. 397 (8 N. P: 117).

But while it is required by the code to attach to and file with the pleading a copy of such instrument, still it is not good pleading to make it a part of such pleading. *Crawford v. Satterfield*, 27 Ohio St. 421, 425. A copy attached to and filed with the pleading under the provisions of this section forms no part of the pleading. *Larimore v. Wells*, 29 Ohio St. 13, 16.

As a consequence the exhibit will not be looked to on demurrer to the pleading to aid its sufficiency. 1 Bates 201, and authorities cited; 1 Kinkead (2 ed.) Sec. 57, and authorities cited. *Nathan v. Lewis*, 12 Dec. Re. 121 (1 Hand. 239):

"Where a petition refers to an exhibit thereto attached, not as part of the petition, but as evidence of the contract in the petition set forth, the exhibit cannot be regarded upon a demurrer to the petition, for insufficiency of facts."

"Where a contract is susceptible of two natural constructions, a demurrer admits that construction most favorable to the pleader, and which goes to sustain his pleading. If the defendant desires to maintain a construction favorable to himself, he must do so by answer."

In the case of *Memphis Med. College v. Newton*, 12 Dec. Re. 382 (2 Hand. 163), the plaintiff declared upon a transcript of a judgment of a sister state and it was there held that such transcript was not an instrument in writing under Sec. 122 of the code (Sec. 5086 Rev. Stat.) but it might be such an instrument of writing as is authorized by Sec. 117 (Sec. 5085 Rev. Stat.) to be filed with the petition as evidence, and the syllabus adds:

"Section 117 of the code was intended as a substitute for oyer under the old practice, and perhaps as a requisition on the plaintiff to give in advance those copies of written instruments, on which the action might be founded, which he might have been required to give under the former practice act.

"It was not the intention of Sec. 117 to allow copies of instruments therein mentioned to be considered part of the pleading and to be incorporated as such into the final record."

West & Co. v. Dodsworth, 12 Dec. Re. 549 (1 Disn. 161):

"The facts necessary to constitute a cause of action should be stated in the body of the petition, and, except in the case of actions founded upon written instruments for the unconditional payment of money provided for in Sec. 122 of the code, should be concisely stated, without the necessity of a reference to an exhibit.

"In an action for the recovery of money upon an undertaking in error, where the bond is referred to in the petition as 'filed here-

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with marked A' and it becomes necessary to look beyond the petition to the exhibit, in order to discover the character, amount, condition of the bond, the pleading is not sustainable by any provision of the code."

See also *Sargent v. Moore*, 12 Dec. Re. 511 (1 Disn. 99); *Bowers v. Railway*, 26 O. C. C. 518 (4 N. S. 479); *Riley v. Yost*, 58 W. Va. 213 [52 S. E. Rep. 40; 1 L. R. A. (N. S.) 777].

I desire to call special attention to the case of *Lauer v. Assurance Soc. supra*; almost the same question, and precisely the same in theory, arises in that case as in the case at bar but the questions were raised by a motion to make the petition more definite and certain; on page 400 the court say:

"The second claim of defendant is that the plaintiff be required to state in each petition, if such be the fact, that the applications for the policies were made parts of the contracts of insurance.

"This motion must certainly be overruled. The pleader has his choice of statement; he must set out the material parts of the contract sued on correctly; but he may do this by a recital or copy of the very words of the contract, or by a statement of its substance and legal effect. In the first manner of statement, the court judges of the meaning and effect of the instrument as pleaded; in the second manner of statement, the pleader takes the risk as to the correctness of his interpretation of the contract, and lays himself open, when he comes to his proof, to variance between his contract as alleged and as offered in the evidence. Whichever way he pleads, the court, in the first instance, cannot take judicial notice of what the contract really may be; that is an issuable fact, and is to be determined after an issue thereon has been properly made up."

Speaking with reference to the general allegations of performance of all required conditions, the court, on page 121, say:

"We must look to the contract, as he describes it, to ascertain what the conditions, if any, are; * * * if there are conditions described or to be implied, then the averment as to conditions is to be restricted and confined to them. * * * It is true that as a matter of fact there might be conditions annexed to the defendant's promise over and beyond what is set forth or necessarily implied in the petition; if such be the case, then the plaintiff has not pleaded the contract truly and correctly, but the remedy therefor is not by a motion of this kind, which is in the nature of a special demurrer, and goes only to matter of form. The defect is one of substance, and must be met by making an appropriate issue upon it.

"In the cases at bar the issue would be one of fact as it is very evident the parties differ as to what the true contract is. The plaintiff has pleaded her version of the contract, and as stated by her she has,

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on the face of her petitions, good causes of action. Defendant must meet plaintiff's case by some appropriate plea."

This language is peculiarly adapted to the case now before this court.

It hardly seems necessary to cite further authorities to sustain the position of the court but we are not without an expression upon this question by our Supreme Court.

In the case of *Olney v. Watts*, 43 Ohio St. 499, 507 [3 N. E. Rep. 354], the court say:

"If the decree * * * was the result of an agreement of the parties, and simply confirmed by the court, and that appeared by the direct averments of the petition, we would not say that the court erred in sustaining the demurrer. But this nowhere appears by direct averment. If the exhibit could be looked to, as a part of the petition, perhaps it does appear, but the exhibit is no part of the pleading and does not help it out. We are therefore compelled to lay out of view, what counsel on both sides seem to concede in argument, that we should consider on this demurrer; that is what appears in the exhibit attached to the petition, but not made a part of it."

I cannot close this opinion without calling attention especially to Kinhead's Code Plead. Sec. 57, because this author makes such a succinct and clear explanation of this question that it merits especial approval by the court, and to make this quotation from him:

"The rule may be safely stated that a copy of an instrument as evidence of indebtedness which is not for the unconditional payment of money only which may be attached to a petition under the provisions of Sec. 5085 can not be considered in any sense as part thereof, and that the allegation frequently adopted that a copy is hereto attached and made a part hereof does not make such an exhibit part of the petition and when so attached does not dispense with any of the allegations necessary to be made to constitute a cause of action. The sufficiency of a petition founded upon a written instrument falling under Sec. 5085 and not under 5086 must be determined by its face, and not by any accompanying exhibit, as it forms no part of the pleading and can not be considered in determining its sufficiency upon demurrer."

There being no contention that the allegations of the petition, as *pleaded*, do not state a cause of action, the demurrer must therefore be overruled.

CHATTEL MORTGAGES.

[Franklin Common Pleas, July 1, 1909.]

ARLINGTON C. HARVEY v. ANTONIO CIOCCO ET AL.

ALL CHATTEL MORTGAGES GOVERNED BY AMENDMENT RENEWING FOR THREE YEARS.

Chattel mortgages in existence April 28, 1908, the time of the taking effect of act 98 O. L. 230, amending Sec. 4155 Rev. Stat. and changing the periods of refilling from one to three years, are governed by the provisions of such amendment and, therefore, need not be refilled within the one year period in force when they were executed, such application of the law preserving rather than interfering with vested rights and, such renewals being analogous to limitations governing a right of action, the refilling period in force at the time the remedy is sought, governs; nor does Sec. 79 Rev. Stat. apply in the absence of any action pending or accrued at the time of amendment.

[Syllabus approved by the court.]

Raymond & Gibson, for plaintiff:

Cited and commented upon the following authorities: *Aylmore v. Kahn*, 5 Circ. Dec. 410 (11 R. 392); *Smith v. Parsons*, 1 Ohio 236 [13 Am. Dec. 608]; *Wabash Ry. v. Defiance*, 52 Ohio St. 262 [40 N. E. Rep. 89]; *Weil v. State*, 46 Ohio St. 450 [21 N. E. Rep. 643]; *Gimbert v. Heinsath*, 5 Circ. Dec. 176 (11 R. 339); *United States v. Quincy*, 71 U. S. (4 Wall.) 535 [18 L. Ed. 403]; *Walker v. Whitehead*, 83 U. S. (16 Wall.) 314 [21 L. Ed. 357]; *Bronson v. Kinzie*, 42 U. S. (1 How.) 311 [11 L. Ed. 143]; *Green v. Biddle*, 21 U. S. (8 Wheat.) 1 [5 L. Ed. 547]; *Bernier v. Becker*, 37 Ohio St. 72; *Cooley*, Const. Lim. 370; *Allen v. Russell*, 39 Ohio St. 336; *Kelley v. Kelso*, 5 Ohio St. 198; *Steamboat Monarch v. Finley*, 10 Ohio 384; *State v. Rabbits*, 46 Ohio St. 178 [19 N. E. Rep. 437]; *Moon v. Durden*, 2 Exch. 22; *Sutherland*, Stat. Const. Sec. 641; *Montpelier v. Senter*, 72 Vt. 112 [47 Atl. Rep. 392]; *Brown v. Hughes*, 89 Minn. 150 [94 N. W. Rep. 438]; *State v. Kearney*, 49 Neb. 337 [70 N. W. Rep. 255]; *Bauer Grocer Co. v. Zelle*, 172 Ill. 407 [50 N. E. Rep. 238]; *City Ry. v. Railway*, 166 U. S. 557 [17 Sup. Ct. Rep. 653; 41 L. Ed. 1114]; *Day, In re*, 181 Ill. 73 [54 N. E. Rep. 646; 50 L. R. A. 519]; 8 Cyc. 1022; *Thorne v. San Francisco*, 4 Cal. 127; *Bond v. Munro*, 28 Ga. 597; *Dobbins v. Bank*, 112 Ill. 553; *Dugger v. Insurance Co.* 95 Tenn. 245 [32 S. W. Rep. 5; 28 L. R. A. 796]; *Burt v. Rattle*, 31 Ohio St. 116.

F. M. Glick, for defendant, Walton:

Cited and commented upon the following authorities: *Gager v. Prout*, 48 Ohio St. 89 [26 N. E. Rep. 1013]; *State v. Rabbits*, 46 Ohio St. 178 [19 N. E. Rep. 437]; *Rairden v. Holden*, 15 Ohio St. 207;

McKibben v. Lester, 9 Ohio St. 627; *Taylor v. Thorn*, 29 Ohio St. 569; *State v. Cincinnati*, 52 Ohio St. 419 [40 N. E. Rep. 508; 27 L. R. A. 737]; *Ham v. Kunzi*, 56 Ohio St. 531 [47 N. E. Rep. 536].

C. M. Voorhees, for other defendants:

Cited and commented upon the following authorities: *Kilbourne v. Fay*, 29 Ohio St. 264 [23 Am. Rep. 741]; *Stewart v. Hopkins*, 30 Ohio St. 502; *Biteler v. Baldwin*, 42 Ohio St. 125; *Rairden v. Holden*, 15 Ohio St. 207; *Sturges v. Carter*, 5 O. F. D. 428 [114 U. S. 511; 5 Sup. Ct. Rep. 1014; 29 L. Ed. 240]; *Greene Tp. v. Campbell*, 16 Ohio St. 11; *Goshorn v. Purcell*, 11 Ohio St. 641; *Butler v. Toledo*, 5 Ohio St. 225; *Acheson v. Miller*, 2 Ohio St. 203 [59 Am. Dec. 663]; *Cuyahoga Falls Real Est. Assn. v. McCaughy*, 2 Ohio St. 152; *Kearny v. Buttes*, 1 Ohio St. 362; *Bartholomew v. Bentley*, 1 Ohio St. 37; *Lewis v. McElvain*, 16 Ohio 347; *Johnson v. Bentley*, 16 Ohio 97; *Towsey v. Avery*, 11 Ohio 90; *Hays v. Armstrong*, 7 Ohio (pt. 1) 247; *Westerman v. Westerman*, 25 Ohio St. 500; *John v. Bridgman*, 27 Ohio St. 22; *State v. Richland Tp. (Tr.)* 20 Ohio St. 362; *State v. Wilkesville Tp. (Tr.)* 20 Ohio St. 288; *State v. Harris*, 17 Ohio St. 608; *Cass Tp. (Tr.) v. Dillon*, 16 Ohio St. 38; *Seeley v. Thomas*, 31 Ohio St. 301; *Little Miami Ry. v. Greene Co. (Comrs.)* 31 Ohio St. 338; *Parker v. Burgett*, 29 Ohio St. 513; *Nimmons v. Westfall*, 33 Ohio St. 213; *Oyler v. Scanlan*, 33 Ohio St. 308; *Lawrence Ry. v. Mahoning Co. (Comrs.)* 35 Ohio St. 1; *Union Co. (Comrs.) v. Greene*, 40 Ohio St. 318; *Gager v. Prout*, 48 Ohio St. 89 [26 N. E. Rep. 1013]; *Burgett v. Norris*, 25 Ohio St. 308; *Bartol v. Eckert*, 50 Ohio St. 31 [33 N. E. Rep. 294]; *Templeton v. Kraner*, 24 Ohio St. 554; *State v. Cappeller*, 39 Ohio St. 207; *State v. Peters*, 43 Ohio St. 629 [4 N. E. Rep. 81]; *Peters v. McWilliams*, 36 Ohio St. 155; 15 Enc. Law (2 ed.) 1058; *Vance v. Vance*, 108 U. S. 514 [2 Sup. Ct. Rep. 854; 27 L. Ed. 808]; *Louisiana v. New Orleans*, 102 U. S. 203 [26 L. Ed. 132]; 26 Enc. Law (2 ed.) 749; 6 Enc. Law (2 ed.) 943; *Tucker v. Harris*, 13 Ga. 1 [58 Am. Dec. 488]; *Boston v. Cummins*, 16 Ga. 102 [60 Am. Dec. 717]; *Spivey v. Rose*, 120 N. C. 163 [26 S. E. Rep. 701]; *Cooley. Const. Lim.* 436; *Kloeppinger v. Grasser*, 15 Circ. Dec. 90 (1 N. S. 457).

KINKEAD, J.

The question is submitted upon demurrer to the answer of P. M. Walton which shows that Walton sold and delivered to Ciocco Brothers certain chattel property, for which a chattel mortgage was given, and which was filed November 2, 1907.

The mortgage was not refiled at the end of the year according to the provisions of the law in force at the time the same was executed.

It is claimed that such refiling was not necessary, because of the amendment of Sec. 4155 Rev. Stat. which took effect April 28, 1908 (99 O. L. 230), which provides in substance that chattel mortgages shall be void as against the creditors of the mortgagor, or against subsequent purchasers of mortgages in good faith, after the expiration of three years from the filing thereof, unless, within thirty days next preceding the expiration of the three years the mortgage is refiled.

The mortgagor, Ciocco Brothers, gave a bill of sale for the property covered by the mortgage, on September 10, 1908, to the Ciocco Baking Company, a corporation, which instrument was recorded October 20, 1908, Vol. 7 Misc. records.

This proceeding was brought by the plaintiff, a judgment creditor, to marshal liens, asking that the chattel mortgage to Walton be annulled. A receiver has been appointed for the Ciocco Baking Company.

The question presented by the demurrer is, whether the chattel mortgage is valid against subsequent purchasers, and creditors, because it was not refiled at the end of the year according to the provisions of Sec. 4155 Rev. Stat. before it was amended.

The argument offered in support of the demurrer is that the law, Sec. 4155, as it stood at the time the mortgage was given, governs; that, therefore, the mortgage to be valid must have been refiled within thirty days prior to the expiration of the year, November 2, 1908; that the law existing at the time the contract is made, enters into, and becomes a part of, the contract. This is a correct rule of law the purpose of which is to protect vested rights as occasion arises. This rule is urged in aid of the claim that the old one year rule for refiling applies, which would defeat the rights of the mortgagee, and allow judgment creditors, and a purchaser whose purchase antedated the expiration of even the one year, to intervene. The rule was designed for no such purpose, and if equities are considered, those in favor of the original chattel mortgagee are stronger.

Another rule invoked in opposition to the claims of the original mortgagee is the constitutional inhibition as to retroactive laws. It is urged, in substance, that, if the amended law of April 28, 1908, applies, it would necessarily act retroactively.

The purpose of the constitutional rule touching retroactive laws is to guard and protect vested rights, so that a new law may not reach back and interfere with or destroy them.

To apply such a rule to the chattel mortgage in this case, would defeat his rights. To invoke it in aid of the rights of creditors whose rights are involved in this case does not aid them, nor does it deprive them of any rights.

The plaintiff obtained his judgment December 24, 1907, against the three Ciocco brothers, and the Ciocco Baking Company, which

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does not *per se* operate as a lien upon the personalty and no execution was levied. This judgment creditor claiming through the corporation, his rights must rest upon those of the debtor. The debtor, the Ciocco Baking Company, took the bill of sale September 10, 1908, before even the first year had elapsed.

To permit the amended three year to apply and govern does not infringe upon the vested rights of anyone.

If the amended law is operative upon all existing chattel mortgages, as well as upon all those filed from and after its taking effect April 28, 1908, it operates justly upon the rights of everyone interested in chattel property—owner or creditor.

The judgment of the court is that the amended law applies and determines the rights of all existing chattel mortgages, and that a re-filing thereof under the old law is not essential to the preservation of the rights of the chattel mortgagee.

This conclusion is based upon the theory that, First, such an application does not interfere with, but, on the contrary, preserves vested rights. Second, the limitation of the statute is in the nature of, or analagous to a limitation affecting the right of action, and the limitation in force at the time the remedy is sought governs. If the old law had been repealed, and no new one had been enacted, it would present an entirely different question.

Third, Sec. 79 Rev. Stat. does not apply because there was no pending action, nor was there any right or cause of action, existing at the time of such amendment.

The demurrer to the answer is therefore overruled.

MUNICIPAL CORPORATIONS.

[Lorain Common Pleas, June 26, 1909.]

JOSHUA E. BOYNTON V. ELYRIA (CITY) ET AL.

TWO LOWEST AND BEST BIDS FOR SAME ARTICLES, NOT A COMPLIANCE WITH STATUTE.

Acceptance of two of several bids for furnishing water meters of different manufacture but designed to serve a common purpose, notwithstanding both offer the same price, is a violation of the discretion reposed in boards of public service, and in opposition to the principle of competition designed for protection of taxpayers, by Sec. 143 Mun. Code of 1902 (Lan. Rev. Stat. 3131; B. 1536-679), which requires the directors of public service to make a contract "with the lowest and best bidder" unless all bids are rejected; under such circumstances there cannot be two or more lowest and best bids at the same time within the meaning of this section.

[Syllabus approved by the court.]

C. C. Chapman and F. M. Stevens, for the plaintiff:

Cited and commented upon the following authorities. *Lancaster v. Miller*, 58 Ohio St. 558 [51 N. E. Rep. 52]; *Comstock v. Nelsonville (Vil.)*, 61 Ohio St. 288 [56 N. E. Rep. 15]; *Carthage (Vil.) v. Diekmeyer*, 79 Ohio St. 323; *McCloud v. Columbus*, 54 Ohio St. 439 [44 N. E. Rep. 95]; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406 [54 N. E. Rep. 372]; *Wellston v. Morgan*, 65 Ohio St. 219 [62 N. E. Rep. 127]; *State v. McKenzie*, 29 Circ. Dec. 115 (9 N. S. 105); *State v. Yeatman*, 22 Ohio St. 546; *Boseker v. Wabash Co. (Comrs.)* 88 Ind. 267; *Hoole v. Kinkead*, 16 Nev. 217; *People v. Dorsheimer*, 55 How. Pr. 118; *Beach, Pub. Corp.* 714 Sec. 698; *Hubbard v. Sandusky*, 6 Circ. Dec. 786 (9 R. 638); *State v. Boyden*, 6 Dec. 509 (4 N. P. 322); *Bloom v. Xenia*, 32 Ohio St. 461; *Ravenna v. Railway*, 45 Ohio St. 118 [12 N. E. Rep. 445]; *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374 [49 N. E. Rep. 335]; *Yaryan v. Toledo*, 28 Circ. Dec. 259 (8 N. S. 1); *Ampt v. Cincinnati*, 8 Dec. 475 (5 N. P. 98); *Pease v. Ryan*, 3 Circ. Dec. 654 (7 R. 44); *Lake Shore Foundry v. Cleveland*, 4 Circ. Dec. 230 (8 R. 671); *Müller v. Pearce*, 13 Dec. Re. 758 (2 C. S. C. 44); *Brady v. New York City (Mayor)*, 20 N. Y. 312; *Kerlin Bros. Co. v. Toledo*, 10 Dec. 509 (8 N. P. 62); *Wing v. Cleveland*, 9 Dec. Re. 551 (15 Bull. 50); *Defiance Water Co. v. Defiance*, 68 Ohio St. 520 [67 N. E. Rep. 1052]; *Smith v. Rockford (Vil.)*, 29 Circ. Dec. 478 (9 N. S. 465); *Clark v. Crane*, 5 Mich. 150 [71 Am. Dec. 776]; *Braman v. Elyria*, 16 Circ. Dec. 731 (5 N. S. 387); affirmed, without report, *Braman v. Elyria*, 73 Ohio St. 346; *Emmert v. Elyria*, 74 Ohio St. 185 [78 N. E. Rep. 269]; *McDermott v. Jersey City (Street & Water Comrs.)* 56 N. J. L. 273 [28 Atl. Rep. 424]; *State v. Heppeneheimer*, 54 N. J. Law 439 [24 Atl. Rep. 446]; *Tucker v. Newark*, 10 Circ. Dec. 437 (19 R. 1); *McGreevey v. Board of Ed.* 10 Circ. Dec. 724 (20 R. 114).

H. A. Pounds, city solicitor, and Stroup & Fauver, for defendants.

WASHBURN, J.

The council of the city of Elyria, after determining that it was necessary and proper to finish metering the water services of the city and providing the money therefor, passed the necessary legislation which authorized the board of public service to select and purchase meters according to law.

The board of public service thereupon advertised that sealed bids would be received for furnishing to the waterworks department of said city, f. o. b. cars, Elyria, "1,500, more or less, 5-8 inch meters." In answer to that advertisement the board of public service received

several bids, and among them was the bid of the defendant, the Neptune Meter Co., in which they offered to furnish the required number of meters of a pattern known as the trident disc meter, at eight dollars each, and also the bid of the defendant, the Thomson Meter Co., in which they offered to furnish the required number of meters of a pattern known as the Lambert meter, at eight dollars each. There was quite a number of other bids, two of which, at least, offered to furnish meters at less than eight dollars, and there were two or more bids for more than eight dollars.

The board of public service accepted the bid of the Neptune Meter Co. for eight hundred meters at eight dollars and the bid of the Thomson Meter Co. for 700 meters at eight dollars, and ordered proper contracts prepared; thereupon the plaintiff, who is a taxpayer of the city, applied to the city solicitor to enjoin the board of public service from executing said contracts, and on his refusal to bring suit the plaintiff began this action.

There are several alleged irregularities in the proceedings of the council and board of public service of which complaint is made, but I shall consider only one as that is, in my judgment, decisive of the matter. That question is, Had the board of public service authority under the law to accept the two bids which they accepted, or should the board have either accepted one bid or rejected all bids?

The statutory law upon this subject is found in Sec. 143 of the Mun. Code of 1902 (Lan. Rev. Stat. 3131; B. 1536-679), and it is there provided that when an expenditure is to be made by the board of public service which exceeds \$500 "such expenditure shall first be authorized and directed by ordinance of council and when so authorized and directed the directors of public service shall make a written contract with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

It will be noticed that the council's duty is performed when they authorize and direct the directors of public service to expend the money which they have appropriated, and after that the public's protection is in the direction of the statute requiring that the contract shall be with the lowest and best bidder.

It has been repeatedly held that the board of public service is vested with a very large discretion in determining which is the lowest and best bid; that the lowest bid may not be necessarily the best bid, and that the discretion vested in the board of public service cannot be interfered with by the court unless the proof and circumstances establish what is called a gross abuse of that discretion, that which amounts to fraud or collusion; and it is conceded in this case, so far as

this question now being considered is concerned, that had the board accepted either of the two bids which it did accept, no complaint could be made.

But can there be two lowest and best bids at the same time for articles designed to serve a common purpose but of different manufacture?

In the case at bar the board of public service determined that the meter manufactured by the Neptune Meter Co. was the best meter, and at the same meeting by a similar resolution they determined that the meter manufactured by the Thomson Meter Co., designed for the same purpose, was the best meter. Logically speaking the Neptune meter cannot be better than the Thomson meter and the Thomson meter at the same time be better than the Neptune meter, if they are both designed and to be used for a common purpose. The statute requires that the contract be made with the lowest and best bidder and not the lowest and best bidders.

The statute was designed for the protection of municipal taxpayers generally by preserving and protecting the principle of competition. If there can be two or more lowest and best bids at the same time, then the object and purpose of the statute is endangered, if not destroyed. If the board determined that one bid was the lowest and best it had then placed itself in a position where it was too late to declare, while that resolution was in force, that another bid was also the lowest and best. The taxpayer is entitled to the individual judgment of each member of the board as to which bid is the lowest and best bid. If one member honestly thought that the Neptune Co.'s bid was the lowest and best, and another honestly thought that the Thomson Co.'s bid was the lowest and best, and those two members compromised by accepting a part of each bid, then the taxpayer is deprived of the best judgment of the members of the board as to which is the lowest and best bid, for in that case one member determined that the Thomson Co.'s bid was the best bid and that the Neptune Co.'s bid was not the best bid, and another member determined that the Neptune Co.'s bid was the best and that the Thomson Co.'s bid was not the best.

Aside from this, such a construction of the statute would enable bidders to avoid the competition which the statute is designed to promote, and it is the duty of the judicial tribunals of the state to construe the law so as to advance the purpose sought to be accomplished; and hence I hold in this case that while the Neptune Co.'s meter may be better than the Thomson Co.'s meter, or the Thomson Co.'s meter better than the Neptune Co.'s, or that they might be of equal merit, they cannot be each better than the other, and it being the duty of the board of public service to determine that one or the other was

the best or else reject all the bids, and the board not having performed the duty which the law required for the protection of the taxpayers, the contracts proposed to be entered into are not authorized, and their execution is enjoined.

There are no authorities on this subject in Ohio, and but one in any state as far as I am able to ascertain, and that is the case of *State v. Commissioners*, 56 N. J. Law 273 [28 Atl. Rep. 424]. That case differs from the case at bar in this, that the public authorities awarded a part of the work to the highest bidder and a part to the lowest bidder. The board in that case found that one bidder had had the greater experience in laying pavement and the other bidder had had the greater experience in refining the paving material, which was asphalt, and the object of the board was to ascertain by actual use which was the better; but the Supreme Court of New Jersey determined that "it is the duty of the proper city board or officer to determine which of the bidders possesses the statutory qualifications, and then award the work to that bidder, unless they determine to reject all bids and readvertise for the work."

In my judgment the principle of that case is applicable to the case at bar and a decree may be entered as I have indicated.

CORPORATIONS—INJUNCTION.

[Hamilton Common Pleas, May 13, 1909.]

LOUIS DELACROIX ET AL. V. L. EID CONCRETE STEEL CO. ET AL.**1. INJUNCTION HELD NOT REMEDY TO CURB GOING CORPORATION OFFICER'S EXERCISING DELEGATED AUTHORITY.**

Injunction will not lie on the part of minority stockholders, to restrain the president of a corporation from entering into contracts in the name of the company, its appearing that he is acting as manager by virtue of the corporation by-laws, that he is the only one connected with its affairs having a practical knowledge of the business, and in the absence of a showing that a majority of the then present directors are not disposed to perform their duties as such; especially, since the company, through the knowledge, skill and direction of the president, has been phenomenally successful financially and in the growth of its business. Courts will not supplant duly constituted, legal control of corporations or curb official authority in the absence of fraud or breach of trust shown.

2. DISTRIBUTION OF SURPLUS PROFITS REQUIRED TO OPERATE BUSINESS OF CORPORATION CANNOT BE COMPELLED.

A court of equity has no power to compel a corporation through its board of directors to declare dividends where no demand has been made therefor or complaint by any stockholder for failure to pay dividends; hence, where the original paid-up capital stock is small and a large cash capital is required to do its business, or greater credit is needed than the size of the plant would secure, surplus profits applied to such uses will not be ordered distributed by the courts as dividends. Payment of 100 per cent dividends, though after institution of suit therefor, will be deemed reasonable since the company had been incorporated and the plant in operation but little over four years.

3. RECEIVERSHIPS FOR CORPORATIONS NOT APPROVED.

Courts have no power to take the control and management of the business of solvent corporations out of the hands of the duly constituted board of directors and commit it to the agent of the court acting as a receiver.

4. TRUST IN CORPORATE STOCK BY CORPORATION.

Corporations having no power to traffic in their own stock, a resultant trust for a corporation cannot be declared in stock purchased by one stockholder from another, even for the use of the corporation.

[Syllabus approved by the court.]

Healy, Ferris & McAvoy, for plaintiffs.

R. B. Smith, Adolph Richter and C. A. Groom, for defendants.

GORMAN, J.

This action is brought by the minority stockholders of the defendant company against the company and the owners of the majority of the stock. In substance, the plaintiffs allege that the defendant company was incorporated under the laws of Ohio, in January, 1904, for the purpose of engaging in the business of constructing buildings and other structures of re-enforced concrete, with an authorized capital stock of \$10,000, of which stock 157 shares of the par value of \$7,850 have been issued, each share being of the par value of \$50; and on the books of the company said issued stock is held as follows: Ludwig Eid, 81 shares; G. R. Stattlemann, 40 shares; Henry Schick, 2 shares;

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Louis DeLacroix, 20 shares; George DeLacroix, 10 shares; Theodore Kraemer, 4 shares, and that said issued stock is fully paid for.

Plaintiffs further allege that in the month of March, 1905, the defendant corporation with the consent of all its stockholders, purchased the forty shares of stock then held by George Stattlemann upon the understanding and agreement that said stock should be retired and cancelled; that in making said purchase, it was agreed that the certificate held by said Stattlemann should be signed by him to the defendant, Ludwig Eid, but said stock was in fact paid for out of the funds of said company, but that said Eid now claims to be the owner thereof.

Plaintiffs further set out that the directors elected after the incorporation of the company were five, of whom Louis and George DeLacroix, Ludwig Eid and Stattlemann were four, and Joseph DeLacroix, the fifth; that Eid was elected president and treasurer, Louis DeLacroix, vice president, and Henry Schick, secretary, and that the same board of directors and officers were re-elected in February, 1905, and in 1906 the same directors were elected except Stattlemann, in whose place Henry Schick was elected, and the officers were the same as the previous years and Louis DeLacroix was appointed general superintendent of construction.

Plaintiffs further say that no directors have been elected since February, 1906; that since the organization of the company there has been on hand a large surplus out of which dividends could have been paid to the stockholders, but in fact no dividends have ever been paid; that the company has now on hand \$150,000 over and above its capital stock issued, and that of said sum the greater part thereof is available for the payments of dividends.

Plaintiffs further aver that after the election in February, 1906, said Eid took possession of the moneys, property, assets and business of the company and still retains possession thereof, and is managing and controlling the business of said company and has excluded the plaintiffs and the board of directors therefrom; that he has taken large contracts in the name of the company for the construction of buildings without the authority of directors and without consulting them; that he has refused to allow any dividends to be paid to plaintiffs on their stock; that since November, 1906, there have been but four directors because Joseph DeLacroix then transferred his stock to plaintiff, Kraemer, thereby causing a vacancy in the board of the directors which has not since been filled; that defendant Schick is entirely controlled by Eid, and the minutes of the company are dictated by Eid and written down by Schick as directed by Eid; that said Eid has recently entered into large contracts, one in Indianapolis

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for \$80,000, one with the city of Cincinnati for \$145,000, and one with the city of Newport, Kentucky, for \$25,000, and numerous other contracts all without the consent or authority of the board of directors of the company; and that said Eid threatens to continue to carry on the business of the company without the sanction of the board of directors, and to take large contracts in its name without the consent or approval of the board of directors, and that he is now holding its property and moneys in his exclusive possession and if permitted to continue to do so, great loss and irreparable damage may be suffered by plaintiffs.

In conclusion the plaintiffs pray:

First. That Eid may be enjoined from entering into any further contracts in the name of the company without the approval of its board of directors.

Second. That said company and its directors may be compelled to declare and pay to the stockholders such dividends as may be just and proper.

Third. That a receiver be appointed to take charge of, and manage and conduct the company's business and the company wound up, and its property and assets reduced to money, its debts paid and the balance distributed among its stockholders.

Fourth. That said Eid may be declared by the court to hold said forty shares of stock in trust for the company and that said shares may be cancelled, and that plaintiffs may have such other and further relief as the equity of the case may require.

The L. Eid Concrete Steel Company and Ludwig Eid have filed a joint answer, and the defendant Henry Schick has filed a separate answer. Each answer denies any and all wrongdoing alleged to have been committed by either Eid or Schick and they deny each and every material allegation of the petition.

It is further alleged in the answer of the company and Eid, that on January 11, 1909, five directors were elected, to wit: Ludwig Eid, Henry Schick, William Harig, Adolph Richter and Malcolm McAvoy, and that Eid was elected president and treasurer, Schick, vice president, and Richter, secretary; that in February, 1906, the surplus of the company was \$57,911.86, and in March, 1908, it was \$100,000; that at the meeting of the directors of the company in January, 1909, a dividend of 100 per cent was declared, amounting to \$7,850, and that it would have been imprudent and inadvisable to have declared a larger dividend or to have previously declared any dividend for the reasons that the necessities of the business required the use of all its assets to meet the demands of a large growing business, and to be prepared to meet a large threatened claim against the company; that

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the directors and all officers in the matter of declaring a dividend and in all other matters, have acted in the utmost good faith and in the exercise of their discretion for the best interests of the company and all the stockholders; that in the matter of the contracts entered into and undertaken by Eid on behalf of the company, full authority was given under the rules and regulations of the company and by action of the board of directors; that wide powers were vested in Eid by the rules and regulations in respect to the making of contracts and that this was absolutely necessary to the successful prosecution of the business of the company, on account of his superior knowledge of the details of the work, which knowledge was not possessed by any other officer or directors, Eid being a competent and highly educated and skilled engineer in the line of all concrete and ferro-concrete construction, the kind of construction for which the company was organized to engage in and carry on; that no objection to the exercise of said powers and authority by Eid was made by plaintiffs until the bringing of this action.

Eid denies that he ever in the past has acted or intends in the future to act either in respect to the making of contracts, or in any other matter, other than as he has been duly and lawfully authorized to do. Eid further alleges that on April 15, 1905, he purchased in good faith and for value with his own money the forty shares of stock owned by George Stattlemann, and has ever since been and is now the owner thereof, said stock not having been transferred on the books of the company, awaiting the termination of this litigation.

Schick in his answer, adopts the averments of the answer of the L. Eid Concrete Steel Company, and in addition thereto, denies that his vote in the board of directors had been controlled by Eid. He denies that he prevented the selection of a successor to fill a vacancy in the board of directors of the company. He denies that Eid has controlled him as secretary of the company or dictated to him as secretary the minutes to be entered of the meetings of the board of directors; he denies that Eid has prevented him from making an accurate record of the proceedings of said board of directors.

It will therefore be seen that on all the material averments of the petition there is an issue raised by the answers. I shall take up and dispose of the four legal propositions involved in the case as indicated by the prayer for the relief asked.

First. On the pleadings and the evidence, shall Ludwig Eid be enjoined from entering into any further contracts in the name of the company without the approval of the board of directors? By the rules and regulations of the company, Eid, the president, is made the general manager of the business, and a board of

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five directors is provided to control the affairs of the company. Eid is a member of the board of directors, at present the other four being, Henry Schick, William Harig, Malcolm McAvoy and Adolph Richter.

Whatever might have been the disposition or inclination of the former boards of directors, it is not claimed that a majority of the above named directors are disposed or inclined to act otherwise than for the best interests of the company, and in the absence of a showing that the present board of directors will not do their full duty, it would appear to the court to be a piece of impertinence and presumption on the part of this court to undertake to supplant the duly and legally constituted body in whom the law vests the power of directing and controlling the affairs of the corporation. If Mr. Eid is exceeding the authority delegated to him by the law, the rules and regulations of the company, and the resolutions and actions of the board of directors, it is within the power of the directors to curb his conduct and repudiate any unauthorized act of his.

Furthermore, on January 8, 1906, by unanimous vote of the directors, including the votes of plaintiffs, the following resolution was adopted:

"On motion Mr. L. Eid was authorized to administer the whole business, deeming it for the best interests of the company, seeing fit."

The evidence discloses that Eid is the only one connected with the company who is capable of making an intelligent estimate of the cost of a structure such as the company is engaged in erecting; that he and he alone, is capable of making an intelligent and safe bid for work and that he and he alone is qualified among all the stockholders and directors, of passing judgment on the question of whether or not the work is properly done. He is the owner of more than one-half of the capital stock, aside from the forty shares in dispute, and is therefore more vitally interested in the financial success of the company than all the other stockholders combined. His management and conduct of the company's business during a period of about four and one-half years of its existence, has shown itself to be phenomenal.

From a small venture in which the combined holdings were \$7,850 in cash paid into the treasury in February, 1904, the net value of the assets of the company at the beginning of the present year was over \$100,000, according to the admission of Mr. Eid and the company, but according to the claim of the plaintiffs, the net value of the assets is nearer \$150,000, and the greater part of this wonderful success has been brought about by the knowledge, skill and direction of Mr. Eid. Surely the plaintiffs cannot seriously desire the court to enjoin Mr. Eid from doing what he has been authorized by the directors to do, and that in face of the fact that no objection was ever made by

any stockholder or director, inside or outside of any directors' or stockholders' meeting, to the course pursued by Mr. Eid as president and general manager. The court is of the opinion that there is no warrant or precedent for an injunction in this case, and that no authority can be cited in support of the contention of plaintiffs. To the mind of the court, an injunction in this case would be fraught with the same disastrous results as followed the action of the avaricious man mentioned in that ancient classic, "Mother Goose's Melodies," who became impatient because the goose laid but one golden egg each day and therefore killed the goose.

An injunction will not be granted on the application of stockholders, to interfere with the board of directors of a corporation, or its management of the affairs and business of the company, when they or the manager are acting within the scope of their authority, in the absence of a showing of fraud or breach of trust. *Sims v. Railway*, 37 Ohio St. 556; *North Fairmount Bldg. & Sav. Co. v. Rehn*, 8 Dec. 594 (6 N. P. 185); *Duckworth v. Railway*, 1 Circ. Dec. 618 (2 R. 518); *Goebel v. Brewing Co.* 2 Dec. 377 (7 N. P. 230); *Baldwin v. Railway*, 1 Dec. Re. 532 (10 W. L. J. 337); *Walker v. Railway*, 8 Ohio 38, 39.

Second. Shall the defendant company and its directors be compelled to declare and pay to the stockholders such dividends as may be just and proper?

The matter of the payment of dividends rests in the sound discretion of the board of directors; and the only restriction imposed upon the directors under the Ohio Statutes are found in Lan. Rev. Stat. 5218 to 5221 (B. 3269-1 to 3269-4), which in substance provide that dividends shall be declared and paid by the directors out of the surplus profits, defining what are surplus profits, and prescribing penalties for the payment of dividends out of any other funds or resources except such surplus profits as are therein defined.

It is argued by counsel for plaintiffs that a court of equity has power to require the directors of a corporation in a proper case to declare a dividend, and it may be and is conceded that such power is lodged in the court, but the question of what is a proper case, must and does rest in the sound discretion of the court. Each particular case must stand upon the facts disclosed by the evidence. In the case at bar, there never was any demand made upon the board of directors for a dividend before the bringing of this action; there was no complaint made by any stockholder because of the failure to pay a dividend; and it can scarcely be claimed that a court of equity should order the board of directors to do an act which they might have willingly done, had they been requested to do so.

Furthermore, it appears from the evidence that the defendant company at times, requires a large sum of money to meet its bills, and inasmuch as the original capital invested by the stockholders was comparatively small and the company has been in operation of its business but a short time, it would appear to be consistent with prudence and good business management for the directors to permit the surplus or profits to accumulate so that the company would not be under the necessity of borrowing money to carry on its business. The value of its real estate and machinery is not more than \$25,000, and the credit of the company would be largely based upon the value of these assets, and not on the cash or outstanding claims due it. Surely, the court cannot say, as a matter of law, that the action of the board of directors under such circumstances, in failing to declare and pay a dividend, is an abuse of their discretion.

The law gives the board of directors the discretion to declare a dividend, not the stockholders, nor the court, and it would, indeed, be a bold and daring court that would supplant the board of directors, substitute its judgment for that of the directors, and assume the grave responsibility of declaring that a certain dividend should be paid to the stockholders, under the facts disclosed in this case. An examination of the authorities cited by counsel for plaintiffs on this point, discloses the rule to be that the discretion vested in the board of directors to declare a dividend, will not be interfered with or controlled by the courts, in the absence of a showing of bad faith or an arbitrary and unjustifiable withholding of profits. 9 Am. & Eng. Enc. Law (2 ed.) 686-687; *Arbuckle v. Spice Co.* 11 Circ. Dec. 726 (21 R. 356); *Cook, Corporations* (2 ed.) 1476, Sec. 545, and cases there cited. See, also, 2 *Thompson, Corporations* Sec. 2128; also the following authorities cited by counsel for defendants: *Elliott, Priv. Corp.* Sec. 399; 2 *Cook, Corporations* (5th ed.) Sec. 545; *Bartow Lumber Co. v. Enwright*, 62 S. E. Rep. 233, 235 (Ga.); *Bryan v. Bank*, 40 Tex. Civ. App. 307 [90 S. W. Rep. 704]; *Rollins v. Denver Club*, 43 Col. 345 [96 Pac. Rep. 188].

In view of the fact that the rules and regulations of the defendant company provide that "Dividends shall be declared at the discretion of the board" (of directors), the case at bar is stronger than most of those met with in the books. See *Reynolds v. Paper Co.* 69 N. J. Eq. 290 [60 Atl. Rep. 941].

But if any further reason were required why no dividend should be ordered to be declared by this court in the case at bar, it is furnished in the fact that in January of this year, the board of directors met and declared a dividend of 100 per cent, although plaintiffs' representative voted in the board meeting against the declaration of the dividend, and

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this dividend has been paid to all the stockholders, although some of them have refused and neglected to cash their dividend checks. Such a dividend is rarely declared in any enterprise in less than five years from the organization of the company. The stockholders have now received more than an average annual dividend of 20 per cent since the organization of the company, and the company's assets remaining, are worth probably \$100,000. Most men would not only be satisfied with such a magnificent showing, but would be so delighted with the genius of the man, Eid, who has accomplished this that they would be willing to give him *carte blanche* to conduct the business to his own satisfaction, as the directors of this company apparently did, as shown by the minutes of the board of directors.

Whatever foundation plaintiffs might have had at the time of the filing of their petition in this case, for asking this court to declare a dividend or to order the directors to do so, has been utterly removed by the action of the directors in declaring this dividend of 100 per cent in January of this year. And while it may be claimed that this action was taken to forestall this court in ordering the declaration of a dividend, the fact remains that there was no reason in law, equity, good morals, or good conscience, why the directors could not have acted in the matter of this dividend just as they have done. The ground of complaint as to the dividend, does not now exist, and the court ought not to do or order to be done, an act which the party against whom the complaint is lodged, has already done, even though it were done during the pendency of the suit. The fact that the dividend was declared after the suit was brought, should be considered only for the purpose of determining who should pay the costs or a portion thereof. As to the dividend, the plaintiffs have now secured what they are asking the court in their petition to give them, and a court of equity will not do a vain and useless thing by ordering that done which has already been done by the party complained of.

Third. Shall a receiver be appointed for the defendant company as prayed for in the petition?

This claim for the appointment of a receiver was not seriously argued to the court in the oral argument by counsel for plaintiffs, nor is there any argument put forward in their briefs in favor of their claim made in the petition that a receiver should be appointed. The court has received the impression from something said during the oral argument that this claim has been abandoned. But if it be still contended that this is a case calling for the exercise of the court's authority to appoint a receiver, it is well to consider the facts of the case in order to apply the law of Ohio touching the appointment of receivers for corporations.

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The defendant company is not only solvent within the meaning of that term as defined by the courts of this state, but its assets are more than ten times the par value of its capital stock after the payment of all its liabilities. There is no authority lodged in the courts of this state to take the management and control of the corporate business out of the hands of the duly constituted board of directors and commit it to the agent of the court acting as a receiver, except, *perhaps*, in the case of insolvency as provided in Par. 5, Sec. 5587 Rev. Stat., or where the jurisdiction is conferred under Secs. 4947 to 5912, inclusive, where the property of the corporation is attached or seized on execution or other legal process and there is danger of its property being lost, or injured, or taken away; or in proceedings in aid of execution, or by married women in actions against their husbands for divorce and alimony under Sec. 5705 Rev. Stat.; or in proceedings under Sec. 5651 to 5688, inclusive, for dissolving a corporation and winding up its affairs by the board of directors or a certain number of its stockholders.

The court doubts very much, the authority or the propriety of courts of common pleas and other tribunals having concurrent jurisdiction with them, to make appointments of receivers, as has frequently been indulged in of late years on the application of the directors and officers of the corporation, *even in cases of insolvency*, and is inclined to the opinion that no authority or jurisdiction to make such appointments on the sole ground of insolvency, exists. It is not the business or the duty of courts to carry on the corporate business of those companies which find themselves in financial straits and are being pressed by their creditors, or for some other reason, are unable to meet their obligations. The doors of the bankruptcy court or the insolvency court are open for such corporations just as they are open to individuals and partnerships doing business in this state.

No special privileges should be shown to corporations either by the executive or judicial departments of government other than has been conferred on them by the legislative branch of the government. It has become too common a practice for the officers and directors of failing or criminal corporations to scurry off to the courts and secure the appointment of a receiver on the *ex parte* statement of the directors, officers, or attorneys of the corporation, and thus place the delinquent or offending concern in hiding behind the skirts of justice, so that its honest creditors or an outraged public that has been wronged and injured, cannot invoke the remedies afforded by the law to secure justice, without first securing the consent of the court making the appointment of a receiver. Such practices have a tendency to bring the courts into ridicule and contempt with the plain people. On the authority of the following Ohio cases the court is of the opinion that

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the appointment of a receiver in this case must be denied. *Railway v. Sloan*, 31 Ohio St. 1; *Railway v. Jewett*, 37 Ohio St. 649; *Duckworth v. Railway*, *supra*; *North Fairmount Bldg. & Sav. Co. v. Rehn*, *supra*; *Goebel v. Brewing Co.* *supra*; *Peter v. Foundry & Machine Co.* 53 Ohio St. 534, 551 [42 N. E. Rep. 690]; *Schone v. Building & Sav. Co.* 6 Dec. 246 (4 N. P. 216).

Fourth. Are the forty shares of stock of the company which were bought by Eid from Stattlemann, held in trust for the company, and should there be a decree entered herein ordering them cancelled?

Upon this question counsel for plaintiffs and defendants have put forth, both in their oral arguments and in their briefs, most strenuous efforts, and there does not appear to have been left any stone unturned by either in their efforts to sustain their respective contentions. The court has been very much assisted by the very able and masterly presentation of this point by the briefs, and if all the authorities cited are not noted or commented upon, it is because the limits of this opinion will not permit the court to thus indulge itself.

The facts touching the transaction of this stock between Eid, Stattlemann and the plaintiffs, giving the evidence the aspect most favorable to the contention of plaintiffs are in substance as follows:

About March 2, 1905, Eid discovered that Stattlemann, who had subscribed and paid for, and then held in his own name, these forty shares of stock, was not acting in harmony with him, or for the best interests of the company. Eid went to the home of Louis DeLacroix that evening and said to the DeLacroix brothers, Louis, Joseph and George, "Stattlemann must go;"—and he requested Louis and Joseph DeLacroix to go down to the office that evening and copy a letter of Stattlemann's lying on his desk and which contained evidence of Stattlemann's duplicity, which the DeLacroix brothers both did. On the following morning, the three DeLacroix brothers met Eid at the company's office, and Eid repeated his statement that "Stattlemann must go, and if he demands payment for his stock, then the company will buy in his stock," and the three brothers assented to this, or made no objection thereto. On the following day, March 4, in the afternoon, Eid met Louis DeLacroix at the company's office and Eid told him that he had seen Stattlemann that morning, and that Adolph Richter, his attorney, had advised him to pay Stattlemann \$2,000 for his stock; that Stattlemann had threatened to get a lawyer and have the company put into the hands of a receiver, and thereupon Louis DeLacroix said they had better not have a lawsuit, but to make the best settlement he could.

When Eid met Stattlemann on March 3, (or April 3) at the company's office he (Eid) had a copy of the troublesome letter written

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by Stattlemann, and he became excited and told Stattlemann he wanted his resignation as a director and officer (this is Stattlemann's testimony) and thereupon Stattlemann said, "Buy my stock and I will go out." Thereupon the two began to negotiate for the sale of the stock and finally Eid agreed to pay Stattleman \$2,750 for his forty shares, and Eid was given a month's time to close the sale. The name of the company was not mentioned in the whole transaction, and Stattlemann supposed he was selling his stock to Eid. At this time the company was indebted to Eid for money loaned to it in the sum of about \$3,400.

On March 7, 1905, Eid had a conversation with the three DeLacroix brothers after he had agreed with Stattlemann, but before he had secured and paid for the stock, in which Eid said, "Now, I have settled with Stattlemann for \$2,750, what fund shall we transfer this to? To which Louis DeLacroix said, "That is something I don't know." Then Eid said he would see Richter about it. Eid denies that any of these conversations took place except the one at the house of Louis DeLacroix, which he says was on the second of April, and not on the second of March. Nothing was said by Eid to the DeLacroix brothers or any one else about retiring the stock of Stattlemann. About April 5, 1905, Eid went to the German National Bank and borrowed \$4,000 on the company's note, deposited the proceeds of this note to the credit of the company's account and drew from the company's funds \$2,750 on account of what the company owed him, and this sum is charged to Eid's individual account on the company's books as of that day. On or about April 15, 1905, Eid drew his individual check in favor of Stattlemann for \$2,750, gave this check to Stattlemann, and took the certificate of stock indorsed in blank from Stattlemann, but never transferred the stock to himself on the books of the company as he could easily have done, inasmuch as Schick, his friend, was secretary and according to plaintiffs' claim would do anything Eid said. He held the certificate in his own possession and there was no mention of the transaction after that between the parties until the controversy arose which resulted in this action.

Upon this state of facts the court is asked to find that Eid is a trustee of this stock for the defendant company, and further asked to order this stock retired and cancelled, so that plaintiffs and all the stockholders may receive the benefits of an increased value of their stock by reason of a diminution of the shares, the assets remaining the same.

The first inquiry is, what kind of a trust is to be declared, if these facts are sufficient in law to constitute Eid a trustee?

Trusts are divided with reference to their creation into express trusts, implied trusts, resulting trusts, and constructive trusts. Perry, Trusts Sec. 24; Bispham's Equity, Sec. 20.

An express trust must be created by some declaration of the party or parties, and it is generally created in writing, but it may be by parol.

Can this be an express trust, and if so, who created it? Certainly not Stattlemann. Did Eid, either by writing or in parol, create a trust in this stock?

There is no claim made that Eid after he acquired the stock, declared, either in writing or orally, that he held this stock in trust for the company or any one else. In fact there is no declaration of Eid's at all after he acquired the stock, with reference to it.

A person who is the owner of personal property or any chattel, may create a trust in that property just as well as in real estate. When a person *sui juris* orally or in writing, explicitly or impliedly, declares that he holds personal property *in presenti* for another, he thereby constitutes himself an express trustee. Under the decisions on this point a trust may be created by parol in any mere personal property, as in the shares of corporations, although the corporations themselves, own real estate. Perry, Trusts Sec. 86; *Tyler v. Tyler*, 25 Ill. App. 333, 339; *Porter v. Bank*, 19 Vt. 410; *Forster v. Hale*, 3 Ves. Jr. 696.

Even if the language attributed to Eid at the time he came to an agreement with Stattlemann, when he reported to the DeLacroix brothers on March 3, or 4, or on March 7, had been uttered by him after April 15, 1905, when he had purchased and held the stock, nevertheless, these words are not sufficient to create a trust. Loose, vague and indefinite expressions are not sufficient to create a trust. A mere declaration of a purpose to create a trust is of no value unless carried into effect. Perry, Trusts Sec. 86; *Bailey v. Irwin*, 72 Ala. 505.

In order to create an express trust, Bispham says, Sec. 65, that three things must concur, "Sufficient words to create it, a definite subject, and a certain or ascertained object," and he adds, "to these requisites must be added another, viz., that the terms of the trust shall be sufficiently declared."

In the case of *Hays v. Quay*, 68 Pa. St. 263, it was held that where a party at the time he purchased a certain tract of land executed an instrument by which it was set forth that the purchase was intended for another, the mere fact that the purchaser intended to give the property to the alleged beneficiary, could not have the effect of raising a trust. The declaration of trust must be contemporaneous, or at least, in contemplation at the time the title to the property is vested in the trustee, and if an absolute conveyance is made, no subsequent

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declaration can deprive the grantee of his beneficial interest. Bispham's Equity, Sec. 65; Perry, Trusts Sec. 77.

In order to establish a trust in this state, the evidence must be clear, convincing and conclusive. *Mannix v. Purcell*, 46 Ohio St. 102 [19 N. E. Rep. 572; 2 L. R. A. 753; 15 Am. St. 562]; *Vance v. Park*, 8 Circ. Dec. 425 (15 R. 713), and this rule applies to personal property as well as to real estate and to all kinds of trusts. Perry, Trusts 87, Secs. 77, 86; *Bailey v. Irwin*, *supra*; Pomeroy, Eq. Jurisp. (3d ed.) 1038, 1040; *Vance v. Park*, *supra*; *Fleming v. Donahue*, 5 Ohio St. 255, 256.

It will not of course be claimed that the facts in the case at bar establish a case of a constructive trust. There is no element of fraud, or of a fiduciary who has gained some advantage for himself out of trust property. Eid was not a trustee of this stock before the purchase thereof, at least. He was a trustee or director of the company. Perry, Trusts Sec. 166.

If there is any evidence in this case tending to establish or raise any kind of trust, it must be a resulting trust. Is this a case of a resulting trust?

While counsel for plaintiffs do not claim this in so many words, the arguments advanced to support their contention are such as are usually made in support of resulting trusts.

Now a resulting trust may arise in several ways, but the one way most usual is in a case where a purchase is made and the money paid by one man, and the title to the property taken in the name of another. Here the law implies a trust on the part of the latter to hold the legal title for the benefit of the actual purchaser. If there is a resulting trust in the case at bar it must be of the kind just mentioned, because no other kind of resulting trust can be found to come at all near squaring with the facts adduced from the evidence before the court.

Counsel for plaintiffs assume that the agreement between Eid and the DeLacroix brothers has been established, whereby Eid agreed to purchase these forty shares of stock from Statteman for the company, and then proceeds to show by authorities that the purchase by a company of its own stock is perfectly lawful now in Ohio, since the double liability provisions of the constitution and the laws have been abolished.

It is urged that even before the double liability provisions were abrogated, it was lawful for a corporation under some circumstances to buy its own stock. This proposition is true, but the right to buy its own stock existed only in such cases as those in which the corporation had a lien on its own stock in equity, and found it necessary to buy in the stock to protect itself from loss. *Columbus, H. & T. Ry. v.*

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Burke, 10 Dec. Re. 136 (19 Bull. 27); or where the corporation had exchanged stock for property it may re-exchange to settle a dispute as to the value of the property. *Sanderson v. Iron & Nail Co.* 34 Ohio St. 442; *Morgan v. Lewis*, 46 Ohio St. 1 [17 N. E. Rep. 558]; *Biggio v. Sandheger*, 10 Dec. 316 (8 N. P. 13, 15); or a corporation might buy or take its own stock to secure itself from loss on a pre-existing debt, *Taylor v. Exporting Co.* 6 Ohio 176; *State v. Bank*, 10 Ohio 91, 97.

In the last case cited the Supreme Court on pages 97 and 98, uses this language:

"So bank shares may, by an individual stockholder, be transferred to the bank in payment of a debt, and when so transferred become the property of the corporation, and it is believed that this is the only legitimate way in which a banking corporation can as a corporation, become interested in its own stock. And even the propriety of this mode of acquiring property in stock has been seriously questioned."

Or the company may expend money to take up or regain stock which has been fraudulently issued, where there is reason to apprehend that otherwise great loss may result to it. *Cincinnati, H. & D. Ry. v. Duckworth*, 1 Circ. Dec. 618 (2 R. 518).

Or as a part of a contract of a sale of its shares, a corporation may buy back the same stock at stated times, there being no intervening rights of creditors. *Zerkle v. Price*, 7 Dec. 465 (5 N. P. 480).

But the general rule has been that a corporation is forbidden by law on the grounds of public policy, from trafficking in its own stock. *Holcomb v. Gibson*, 1 O. S. U. 783 (39 Bull. 380); *Hubbard v. Riley*, 7 Dec. Re. 473 (3 Bull. 434); *Shaw v. Ohio Installation & Co.* 10 Dec. Re. 233 (19 Bull. 292); *Coppin v. Greenlees*, 38 Ohio St. 275 [43 Am. Rep. 425]; *Benedict v. Bank*, 6 Dec. 320 (4 N. P. 231); *Wills v. Reed*, 8 Dec. Re. 29 (5 Bull. 79); *Merchants Nat. Bank v. Carriage Co.* 9 Circ. Dec. 738 (17 R. 253); *State v. Building & Loan Assn.* 35 Ohio St. 258; *Cleveland & Pitts. Ry. v. Kelly*, 5 Ohio St. 180; *State v. Bank*, 10 Ohio 91, 98.

It seems to the court that the case of the *Merchants Nat. Bank v. Carriage Co.* 9 Circ. Dec. 738 (17 R. 253), being a decision of our own circuit court, is conclusive and binding on this court on the question of the right of the corporation to buy in its own stock for the purpose of getting rid of, or retiring, one or more of its officers and directors. It was there squarely held that this could not be legally done. Judge Swing in deciding the case uses this very pertinent language:

"The resolution under which this purchase was made recites that it was for the purpose of the retirement of Fallon as vice president

and Junghaus as secretary of the company. This is no valid reason for the company buying in its own stock. It may or may not have been for the interest of the company for these parties to retire from their offices, but it is not sufficient in law for the company to become purchasers of its stock. The necessity for avoiding loss to the company did not exist."

There is a section of the statute, Sec. 3266 Rev. Stat., which forbids any corporation from employing its stock, means, assets or other property directly or indirectly for any other purpose whatever, than to accomplish the legitimate objects of its creation. Surely the employment of the funds of the defendant company in the purchase of the stock of one of its officers for no other purpose than to retire him from the company, is not employing its means or property to accomplish the objects of its creation. See *Railway Co. v. Iron Co.* 46 Ohio St. 44, 50 [18 N. E. Rep. 486; 1 L. R. A. 412].

There is no statute in Ohio authorizing a corporation to traffic in its own stock or to purchase the same, and the general rule is that unless the governing statute or constitution of a company authorizes it in express terms to purchase its own shares, such purchase is *ultra vires*. 2 Thompson, Corporations Sec. 2054; 3 Thompson, Corporations Sec. 3276.

See numerous cases cited under above sections.

It is no answer to the doctrine laid down in the authorities cited to say, as counsel for plaintiffs do in their brief, that the reason for the rule, was to protect the rights of creditors in the enforcement of the double liability provisions, and that inasmuch as no double liability now exists in Ohio, therefore the rule no longer exists, as the reason therefor has disappeared.

There is another reason for the rule than the one mentioned by counsel for plaintiffs, and perhaps two reasons why it should still be in force and recognized, notwithstanding the passing of the double liability rule.

A corporation being an artificial creature of the state, has such powers and only such as are expressly delegated to it or which are necessarily implied to enable it to carry into effect the grant of its express powers. *Bonham v. Taylor*, 10 Ohio 108; *Franklin Bank v. Bank*, 36 Ohio St. 350 [38 Am. Rep. 594]; *Central Ohio Nat. Gas & Fuel Co. v. Dairy Co.* 60 Ohio St. 96, 104 [53 N. E. Rep. 711; 64 L. R. A. 395].

This being true, how can it be contended that it is an implied power of a corporation to traffic in its own stock? Is it necessary to do this in order to enable the corporation to carry into effect any of its express grant of powers? Surely not.

Again, the effect of declaring Eid to be a trustee for this stock and ordering it cancelled, would be the equivalent of ordering a decrease of the capital stock to the extent of these forty shares. The statute points out the method to be pursued to reduce the capital stock of a corporation. Section 3264 Rev. Stat. provides that this may be done on the written consent of the persons in whose names a majority of the stock stands on the books of the company. I am of the opinion that this method of reducing the capital stock is exclusive and that the corporation has not the power to buy in its capital stock outstanding, for the purpose of retiring it, and thereby indirectly reduce the capital stock of the company.

Counsel for plaintiffs assume that corporations, like natural persons, can do any act that a natural person can do unless prohibited by statute, and in support of this proposition, they cite numerous authorities to show that acts of corporations apparently not authorized, have been upheld by the courts. It may be true that in an executed transaction on the part of corporate officers, the act has been upheld when no third person's rights have been effected, but it is quite a different question to direct a corporation to do that which is *ultra vires*, not for the purpose of saving it from loss, but to enable it to do indirectly what it could not do directly except under certain conditions—reduce its capital stock. This court does not believe that any well considered case can be found in the books, which holds squarely that corporations may, like natural persons, do any act not prohibited, provided all its stockholders concur in the doing thereof, and regardless of whether or not it is within its express grant of powers, or those necessarily implied. The distinction between natural and artificial persons in the eyes of the law would be wiped out if this doctrine were to prevail.

In conclusion I am of the opinion that the evidence does not disclose that Mr. Eid holds these forty shares of stock in trust for the defendant company or any other person, but that he bought the stock for himself, with his own money, and that no express trust was ever declared by him in this stock; nor is there either a resulting trust or constructive trust raised by reason of his conduct; and even if the court should be of the opinion that the facts under ordinary circumstances would raise a trust if the transaction had been between individuals or natural persons, nevertheless, there being no authority or power in the defendant company to purchase its own stock under the circumstances of this case, the court would not hold the stock to be in trust for the use and benefit of the defendant corporation.

Having found on all the issues joined in favor of the defendants, the plaintiffs' petition will be dismissed at their costs.

Coal & Coke Co. v. Railroad Commission.

CARRIERS—RAILROADS.

[Franklin Common Pleas, July 1, 1909.]

BLACK DIAMOND COAL & COKE CO. v. RAILROAD COMMISSION OF OHIO ET AL.

1. OHIO RAILROAD COMMISSION HAS NOT EXCLUSIVE JURISDICTION TO DETERMINE DISTRIBUTION OF CARRIER'S EQUIPMENT.

The railroad commission of Ohio is not invested with judicial powers, either in the making of rates or determination of the distribution of cars, etc., such as will preclude courts in suits by shippers to restrain enforcement of such orders, from hearing *de novo* the matters in controversy; nor can such rulings affect the rights of shippers, but they may resort to inherent equity powers to have their rights determined and protected by the courts.

2. IMMEDIATE REQUIREMENTS OF SHIPPERS INCLUDES NEEDS AND FACILITIES OF SHIPPERS AS TO CAR SERVICE.

Section 10 of act 98 O. L. 342, giving the railroad commission power to enforce proportionate distribution of cars among shippers according to their respective immediate requirements, is limited to cases of car shortage; an arbitrary rule made in advance to govern the distant future, based in this case, upon the number of working places, number of men employed, etc., without regard to the extent of business requirements and ability in supplying orders, neither is designed to provide for "immediate requirements," nor is it founded upon a correct and just basis.

3. GENERAL COMMERCIAL TRADE, NOT SPECIAL LINES, GOVERN DISTRIBUTION OF CAR EQUIPMENT.

A mining company, having both a general commercial trade, and a line of trade in railroad fuel coal for which its railroad patrons supply fuel cars, is also entitled to its share in the distribution of commercial car equipment, in proportion to its business facilities and needs, with other mines engaged in exclusively commercial business; to compel it to compute fuel cars in fixing its distributive share under such conditions fosters rather than prevents unlawful discrimination in favor of the exclusively commercial mines; and injunction lies against enforcement of the railway commission's rule fixing such division, and to compel the railway company, supplying equipment, to make equitable distribution of its cars.

[Syllabus approved by the court.]

T. P. Linn, for plaintiff.

W. G. Denman, Atty. Gen., and O. E. Harrison, for defendant.

Wilson & West, for the railway company.

KINKEAD, J.

The plaintiff brings this action against the railroad commission because of its finding and order made against the plaintiff, as shown by the petition.

The railroad company is joined as a defendant, the relief asked against it being that it be restrained from enforcing the order made by the commission.

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Plaintiff claims that the order made by the railroad commission is unreasonable, and therefore null and void.

The attorney general contends that this court cannot hear this matter *de novo*; that the only evidence that ought to be submitted is that tending to show a rating made by the commission is unreasonable. If that be true, the legislature has undertaken to invest the railroad commission with some of the inherent jurisdiction of the common law courts.

The question before the railroad commission which it decided, was a charge of unlawful discrimination against the railroad company in favor of one shipper and against another. The complaint made to the commission was by the shipper injured by the alleged discrimination.

The burden of the claim was that the railroad company furnished to the Black Diamond Coal & Coke Co., a greater percentage of its coal car equipment than it was entitled to, considering its output of coal in comparison with that of the other mining companies along its line.

This question was heard upon evidence by the railroad commission under the provisions of the act 98 O. L. 342, establishing this body. The commission held in substance that the railroad company was guilty of unlawful discrimination in favor of the plaintiff, and it made an order requiring the railroad company to cease and desist from discriminating against the complainant, the Carbon Coal Mining Co., and made an order rating the mines according to their alleged respective capacities or output, directing and requiring the railroad company to follow and observe the same in the future.

The making of the order of rating for future conduct of the railroad company is the exercise of the same character of power as that of finding and determining that the company has been guilty of practicing discrimination in the past.

The power to hear and determine such questions of duty of common carriers has always been considered to be within the exclusive jurisdiction of courts. If the railroad commission act had provided that the commission had final and exclusive power to act in such matters; or if it provided in substance or effect that the matter could not be heard *de novo*, after action by the commission, the law would be invalid because it would be conferring exclusive judicial power upon an administrative body.

The validity of the law is saved because it provides that any parties in interest may commence an action in this court against the commission. It comes nearly passing the constitutional border line when it provides that this court shall send the case back to the commission

if the evidence taken in the hearing here is new or different from that had before the commission. The commission is then given another opportunity to pass its judgment. And, if the parties are satisfied with the last finding by the commission, this court is not called upon to exercise its judgment. If the parties are dissatisfied, the case comes back to the court for action.

That was what was done in this case, the submission now being upon all the evidence taken before the commission originally, and that taken before the court upon the first hearing.

The question as to the discriminatory conduct of the railroad company in October and November, 1907, so far as this court is concerned, is a moot question.

The court is of the opinion that the company was not guilty of intentional discrimination, but that it was in good faith acting upon a supposed right in furnishing the plaintiff fuel cars brought upon the railroad line from other lines for the special purpose of shipping railroad coal, or coal to be shipped for use of different railroads.

It appears that the Black Diamond Mine was the only one along the line of the road which was engaging in that character of business. It appears from the evidence that this company made a special business of furnishing various roads with fuel, and these cars were sent by other roads to the Black Diamond Mine for that purpose. This is the reason for the offer of the use of fuel cars made by Mr. Gilbert to the other mines, which it seems was not accepted.

The Black Diamond Company was given the percentage of the regular equipment of the railroad, in addition or independent of the fuel cars.

To bunch all classes of equipment, inclusive of the fuel cars, and to strike a percentage based upon an arbitrary basis of what a mine might or might not do, according to the available number of working places, does not seem to be a just or equitable rule.

What one mine operator may need, and what will be just to him, will depend upon what business he can do, as well as the character of his business, and his ability to do what business he is able to procure. A mine operator may have a goodly number of "working places," but he may not have the ability, industry, push or capital, to get the quantity of business which another who has a mine of equal or less capacity may procure.

The business which one is able to get and do, as shown by his averaged orders, is the safer test.

As to the character of the equipment, I am clearly of the opinion, under the circumstances and conditions in this case as shown by the evidence, that in arriving at the percentages of cars between the sev-

eral mines, it is not just nor equitable to include the railroad fuel cars with the regular equipment in the distribution of its cars. The attorney general admits, and the testimony shows, that the complainant—the Carbon Coal Co. does not desire any railway fuel cars, because it caters to the domestic trade. Notwithstanding the Diamond mine can procure enough general business to demand its just proportion of the regular equipment, and then engage in the special line of railroad fuel in addition, the Carbon Coal Co.'s argument is, though we do not want to engage in the railroad fuel business, still we insist that these railroad fuel cars shall be counted against the Diamond mine, and it shall not be allowed to have its equitable share of the regular equipment even though its business and capacity in the general commercial coal business justifies it. Such an arbitrary rule, without regard to the facts, such as appears in this case, does not seem to be calculated to do justice.

It does not seem to be within the province or power of the commission to make a rule of conduct, arbitrarily setting a standard of duty in the future which shall determine a future judicial question whether the railroad company will or will not be guilty of discriminating acts.

The propriety of intrusting as much judicial power to the commission as the act does, even temporarily, that is, until the aggrieved parties may pursue a roundabout course to obtain a judicial determination, is even questionable. But it would not seem to be within the legislative power, or the intent of the act to authorize the commission to determine a question of duty in advance, arbitrarily and without regard to what might be the circumstances or conditions.

The attorney general has quoted from Judge Dillon's opinion in *Johnson Coal Mining Co. v. Railway*, 14 Dec. 209 (1 N. S. 385), in which he says:

“A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary or otherwise.”

The judge further says that a court of equity will interfere with the policy only when it is calculated or in effect discriminates in favor and against parties.

If a court will not dictate the business management of a common carrier, it would seem that a railroad commission should not substitute its judgment as to any particular rule or policy, as to what would or would not be discrimination, that being purely a judicial question.

The only warrant for the commission making a rating of the mines

seems to be found in Secs. 12, 14 and 28 of act 98 O. L. 342, to the effect that if a practice or service is found to be discriminatory, the commission may fix a reasonable regulation, practice or service to be observed and followed in the future.

Until all existing opinions as to the constitutional and judicial power are modified, the conclusion must be that no such power can be conferred upon, nor exercised by, the commission. And were it not for the saving clause in Sec. 16, providing for what the aggrieved parties have independently of that section, the railroad commission act, as to these matters at least, would be invalid.

The railroad commission has no right by such a rule as it makes in this case, to determine the rights of these mine owners. As to them, the railroad commission act is as a blank. They may resort to the inherent equity powers and have their rights determined and protected.

The least and the most that the commission may do is to observe the provisions of Sec. 10, which provides that when a railroad has an insufficient number of cars to meet all requirements, "*such cars as are available shall be distributed among the several applicants therefor in proportion to their respective immediate requirements without discrimination* between shippers or competitive or noncompetitive prices."

An arbitrary rule made in advance, to govern in the distant future, having no regard for changed conditions, cannot be designed to provide for "immediate requirements." And immediate requirements means the needs and requirements of each and all, the character and extent of their business, as disclosed by the books of the mine operators, and their ability to get out their orders.

If one has a line of trade in railroad fuel coal, in addition to his general commercial trade, and another is not engaged in furnishing railroad fuel, it follows that the immediate requirements of the former are that he must have railroad fuel cars, in addition to his proportionate share of the other cars as determined by his business and his ability to fill his orders.

The conclusion is, that the order made by the railroad commission is not founded upon a correct and just basis; that such a rating founded arbitrarily and for all time, upon the supposed capacity of a mine, as appears from the number of working places, number of men employed, etc., whether made by a state railroad commission, or by a railroad company is unreasonable, unjust, and is not designed to provide for the "immediate requirements" of the respective shippers, but is calculated to foster, rather than to prevent discrimination, under some conditions and circumstances.

Furthermore, the railroad commission has no power, no more than has a court of equity, to make such an order and thus decide the question in advance.

Perpetual injunction granted as prayed for in petition.

MARSHALING LIENS, ASSETS AND SECURITIES.

[Summit Common Pleas, June 26, 1909.]

CHARLES T. CHAPMAN, EXR., v. EDWIN J. VIALI ET AL.

ASSIGNMENT OF LEGACY PRIOR TO MARSHALING LIENS DISPLACES PRIOR RIGHTS TO COMPEL APPLICATION OF LEGACY TO PAYMENT OF DEBTS DUE ESTATE.

Judgment creditors of a legatee, having a subsequent lien to a mortgage on legatee's lands executed to his testator, failing to invoke the equitable right to compel the executor of testator's estate to apply the legacy to the payment of the legatee's debt, cannot subsequently to an assignment of the legacy to a purchaser in good faith and for value, resort to the equitable principle to the detriment of such assignee; the equity to marshal assets is determined at the time of invoking the remedy, not from the taking of securities or establishing of liens.

[Syllabus approved by the court.]

Rogers & Rowley, for plaintiff.

J. A. Kohler, C. E. Smoyer, Wilcox, Parsons, Burch & Adams and Allen, Waters, Young & Andress, for defendants.

WASHBURN, J.

The conceded facts in this case are as follows: James Viall died testate and the plaintiff was appointed executor of the estate. At the time of the decease of James Viall, Edwin J. Viall, his nephew, was indebted to him in the sum of \$4,000, evidenced by a promissory note which was secured by mortgage upon certain real estate in the city of Akron owned by said Edwin J. Viall. By the will of James Viall a \$1,000 legacy was bequeathed to said Edwin J. Viall and no mention of the \$4,000 mortgage was made in the will. James Viall died in March, 1907, and his estate has not been fully administered, but it is wholly solvent. The amount due upon said legacy has not been paid, nor any part thereof, and the amount due on said \$4,000 note has not been paid, nor any part thereof.

The Cleveland & Sandusky Brewing Co., before the death of James Viall, obtained a judgment against Edwin J. Viall for about \$2,000 and by execution, duly issued, obtained a lien upon the real estate of Edwin J. Viall covered by said \$4,000 mortgage, which

judgment and lien is subordinated to the mortgage lien of \$4,000. There are several other judgment creditors of Edwin J. Viall, but their liens are subordinate to that of the Cleveland & Sandusky Brewing Co.

While matters were as indicated and before any proceedings were begun to collect said legacy or to collect said \$4,000 claim due from Edwin J. Viall, and when the executor had taken no steps to apply the legacy to the payment of said \$4,000, Edwin J. Viall borrowed \$500 of a bank and induced the defendant William Williams to sign the note with him as surety. The note became due in ninety days and not being paid the surety was called upon by the bank to pay the same, and thereupon, on September 21, 1908, Edwin J. Viall made an agreement with William Williams by which in consideration of Williams paying said note of \$500 and paying to said Edwin J. Viall the sum of \$300 in cash said Edwin J. Viall assigned in writing to said William Williams said legacy of \$1,000, and a copy of said assignment was duly served upon the executor.

The court finds that this was a *bona fide* sale and that William Williams paid the price agreed upon, but at the time of the purchase William Williams understood that the executor had a right to retain said legacy and if the mortgaged property failed to sell for enough to satisfy the \$4,000 debt, that he then had a right to apply so much as was necessary of the legacy to the payment of any deficiency there might be. The proof failed to show that he had any actual notice of the judgment of the brewing company, but that was a matter of record in the county where he lived, and the court finds that he probably knew that Edwin J. Viall was insolvent, or at least, he knew he was in failing circumstances at the time the assignment was made.

In November, 1908, this suit was begun by the executor to foreclose said \$4,000 mortgage, and said brewing company and the other creditors and William Williams are defendants.

During the present term of court an order was made by consent of the parties in which provision was made for the sale of the real estate covered by said \$4,000 mortgage under the order of the court, the proceeds to be brought into court to await its order and judgment according to the rights and interests of the respective defendants as well as the plaintiff. The amount realized upon the sale of the property, which was regularly and duly made, exceeds by more than \$1,000 the amount due to the estate of James Viall upon the note and mortgage, and in the distribution of this fund the Cleveland & Sandusky Brewing Co. asks that said executor shall first apply the sum of \$1,000, the amount of the legacy, upon the amount due upon the note and mortgage, leaving the balance to be applied upon the claim of the Cleveland & Sandusky Brewing Co. and the claims of

the other creditors, ignoring any right of William Williams to any part of said legacy or the proceeds of said sale.

To obtain this result the brewing company invokes a well-recognized and familiar equitable rule on the subject of marshalling securities or liens. That rule has been well stated to be that "the general principle is that if one party has a lien on or interest in two funds for a debt and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties."

If this rule is applicable to the facts stated, the contention of the brewing company is correct. The authorities recognize the fact that this rule must be taken with the modification and exception that in its application the rights of third parties shall not be prejudiced. 4 Pomeroy, Eq. Jurisp. (3 ed.) Sec. 1414; *Hoff's Appeal*, 84 Pa. St. 40; *Gilliam v. McCormack*, 85 Tenn. 597 [4 S. W. Rep. 521]; *Cannon v. Kreipe*, 14 Kans. 324; 26 Cyc. 931; *Green v. Ramage*, 18 Ohio 428 [51 Am. Dec. 458].

Perhaps the leading case on this subject is *Green v. Ramage*, *supra*, in which case the syllabus reads as follows:

"Where A has a mortgage upon two lots, and B has a subsequent mortgage upon one, and C upon the other of the two lots of a later date than the mortgage of B, A cannot be compelled at the instance of B to exhaust first the lot on which C has his mortgage."

In order that a third party injuriously affected may prevent the application of the rule above referred to, he must not have an inferior right or equity as against the party claiming the benefit of the principle. The question then is, Is Williams' claim an inferior right or equity to the claim of the brewing company? The claim is made that it is, because he purchased the legacy after the lien of the brewing company had attached to the real estate and when the executor had a right in law, if he saw fit, to apply the legacy to the discharge of the \$4,000 indebtedness, and that therefore Edwin J. Viall could not by assigning the legacy to Williams change the situation so as to defeat the right of the brewing company to have the executor make such application under the general principle above referred to.

The answer to this contention is that while the executor had the right to make such application, at the time of the purchase by Williams the brewing company did *not* then have a right to compel the executor to make such application. The brewing company did not then have any lien or claim upon the legacy and had taken no steps to invoke the principle of equity above referred to or prevent any

change in the situation. Until something was done by somebody to invoke said principle, Edwin J. Viall had a right to mortgage his legacy, or to assign it as security, or to sell it, subject only to the right of the *executor* in reference to it, but not subject to any right of the brewing company in reference to it. In other words, until the brewing company took proper steps to enforce its rights to marshal assets or to protect that right, then its right was subject to displacement and defeat by subsequently-acquired liens or assignments, for the equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken, but on the contrary, is one to be determined at the time the marshalling is invoked (*Gilliam v. McCormack supra*). Upon this ground rests *Green v. Ramage, supra*, for in that case at the time when C took his mortgage B had a right to invoke the application of this principle; but C's mortgage of a later date, but before B had begun proceedings to marshal assets or protect that right, prevented the application of said principle.

Applying these principles to the case at bar, the brewing company cannot invoke said principle to the detriment of William Williams who was the purchaser of said legacy in good faith and for value.

Distribution ordered accordingly.

MOTIONS—PLEADINGS.

[Wayne Common Pleas, April 12, 1909.]

JOHN DYE v. MORRIS L. BUCHWALTER ET AL.

1. MOTION TO STRIKE OUT INTERROGATORIES IMPROPER PRACTICE.

Neither Sec. 5099 Rev. Stat. giving the right to attach interrogatories to a pleading, nor any other section authorizes striking out interrogatories on motion.

2. DEMURRER LIES TO INTERROGATORIES IN ABSENCE OF SHOWING OF PERTINENCY TO PLEADING TO WHICH ATTACHED.

An answer neither setting forth any issue nor indicating the character or substance of the defense tendered cannot be made the subject of interrogatories; hence, in the absence of a showing of the pertinency of the interrogatories to the answer demurrer will lie.

[Syllabus approved by the court.]

M. L. Spooner and G. A. Hoover, for plaintiff.

Robertson & Buchwalter and Weiser & Ross, for defendant.

MOTION TO STRI

NICHOLAS, J.

This cause is for hearing
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Dye v. Buchwalter.

answer in due time after said annexed interrogatories have been fully answered."

The pleading might as well have been christened something else, and merely naming such a paper an answer by no means answers the demand of our code that the defendant shall set forth his grounds of defense. No issue is tendered by this paper, nor is any intimation even given to the court to indicate the character or the substance of the defense of this defendant. This being true, how can this plaintiff be required at this time to answer interrogatories?

The propounding of interrogatories in a pleading has not been much resorted to under our modern practice, consequently authorities in this state are not numerous, but we think they are sufficiently so to furnish all the light on this subject necessary.

Section 5099 Rev. Stat. of our code was intended to supply the purpose of actions in discovery at common law, some such proceeding being made necessary by the abolition of the distinction between actions at law and suits in chancery by our reformed proceeding, and our courts have uniformly held that this section should be construed in the light of the practice in chancery under the ancient form of procedure known as bills of discovery. In that proceeding, which was an independent one and in no wise connected with the action in which discovery was desired, the party seeking discovery was required to set forth so much of the facts as claimed by him as made the matter sought to be discovered pertinent to his claim in the other controversy, for that proceeding, like a proceeding under this statute was not a mere fishing expedition, but was intended as a means of discovery, not of his opponent's cause of action or ground of defense, but of his own cause of action or ground of defense.

This being the true principle upon which the right of discovery depends, how can this court say that any interrogatory is necessary, pertinent or useful to this defendant when the court is not notified as to what that defense is to be?

If there was any doubt in the mind of the court of this principle, Mr. Nash in his most excellent work on Pleading and Practice (5 ed.) page 248, would certainly remove such doubt, for he says:

"When the defendant files his answer then the pertinency of interrogatories are dependent upon the nature of the answer, and interrogatories may be propounded on the issue or issues thus made."

The court therefore being unable to see the pertinency of any of these interrogatories to the defense of the defendant, sustains the demurrer to each of them, and exceptions are noted.

Putnam Common Pleas.

ASSIGNMENTS—COUNTERCLAIM AND SET-OFF.

[Putnam Common Pleas, 1909.]

*BANK OF LEIPSIC v. N. W. OGAN.

DAMAGES RECOVERED AGAINST THE GRANTOR BY THE GRANTEE OF PREMISES FOR LOSS BY FIRE WHILE IN POSSESSION OF GRANTOR AND AFTER SALE, BEING IN TORT, CANNOT BE SET OFF OR COUNTERCLAIMED AGAINST PURCHASE MONEY NOTES AND MORTGAGE GIVEN BY GRANTEE AND SOLD AND TRANSFERRED TO AN INNOCENT PURCHASER FOR VALUE AFTER AND WITHOUT NOTICE OF SUCH FIRE AND BEFORE SUIT BROUGHT THEREON.

On August 18, 1903, M sold, and by deed of general warranty conveyed to O in fee, certain real estate. Contemporaneous with said sale and conveyance O executed and delivered to M his two certain nonnegotiable promissory notes for balance of unpaid purchase money, due in one and two years respectively, and a mortgage on said premises securing the notes. On September 8, 1903, M for full value sold and delivered said notes and the mortgage securing the same to plaintiff and then endorsed said notes in blank and assigned and transferred the mortgage securing said notes to the plaintiff. When the deed, notes and mortgage were executed and delivered, a dwelling house, outbuildings and fruit trees were standing on a part of said premises so sold and conveyed; and on the night of August 19, 1903, and while said premises were yet in the possession of M said building and certain fruit trees were destroyed by fire. Afterwards, to wit: On August 22, 1903, O duly commenced an action (No. 9159) in damages, in the court of common pleas of Putnam county, Ohio, against M to recover the value of said buildings and trees. Thereafter on April 21, 1904, O, by the consideration of said court, duly recovered a judgment in said action against M for \$700 and costs, which judgment is in full force and effect. At the time plaintiff purchased said notes and mortgage sued upon in this action it had no notice or knowledge of the facts set up or claims made by O against M in said cause No. 9159, and had no such notice or knowledge until September 9, 1904, and said O had no notice or knowledge of the transfer of said notes and mortgage by M to plaintiff until September 9, 1904. That on September 15, 1903, M left Ohio and has ever since and still is a nonresident of this state, nor has M since leaving said state, had, nor has he now, any property or property rights in said state, and his whereabouts have been at all times since September 15, 1903, and still are unknown to the parties hereto. After obtaining the judgment in cause No. 9159, and after the commencement of this action, O departed this life and his administrator has been properly substituted. Upon these facts: *Held*, That neither O nor his administrator could set up said judgment so obtained by O against M and maintain the same, either as a counterclaim or set-off in an action on said notes and mortgage brought by the plaintiff against said O.

Watts & Moore, for plaintiff:

Cited and commented upon the following authorities: 25 Am. & Eng. Enc. Law 508; *Needham v. Pratt*, 40 Ohio St. 186; *Roberts v. Carter*, 38 N. Y. 107; *Hathaway v. Gordon*, 6 Circ. Dec. 39 (9 R. 8); *Waterman*, Set-off (2 ed.) 122, 444, Secs. 107, 423; *Pomeroy*, Rem. & Rem. Rights 164; *Fuller v. Steiglitz*, 27 Ohio St. 355 [22 Am. Rep. 312]; *Mead v. Gillett*, 19 Wend. 397; *Martin v. Kunzmüller*, 37 N. Y.

*Affirmed by circuit court, without report, January, 1909.

Bank v. Ogan.

396; *Myers v. Davis*, 22 N. Y. 489; Wharton, Contracts Sec. 1029; *Zeigelmüller v. Seamer*, 63 Ind. 488; *Smith v. Printup*, 59 Ga. 610; *Pierce v. Carey*, 37 Wis. 232; *Hall's Appeal*, 40 Pa. St. 409; *Robison v. Hibbs*, 48 Ill. 408; *Harris v. Rivers*, 53 Ind. 216; *Young v. Hargrave*, 7 Ohio (pt. 2) 63; *Frost v. Raymond*, 2 Caines 188 [2 Am. Dec. 228]; *Akerly v. Vilas*, 23 Wis. 207 [99 Am. Dec. 165]; *Ellis v. Welch*, 6 Mass. 246 [4 Am. Dec. 122]; *Midgett v. Brooks*, 34 N. C. (12 Ired.) 145 [55 Am. Dec. 405]; *Bostwick v. Williams*, 36 Ill. 65 [85 Am. Dec. 385]; *Follett v. Buyer*, 4 Ohio St. 586; *Whims v. Grove*, 1 Circ. Dec. 59 (1 R. 98).

J. S. Ogan, for defendant:

Cited and commented upon the following authorities: *Baker v. Kinsey*, 41 Ohio St. 403; *Ellis v. Welch*, 6 Mass. 246 [4 Am. Dec. 122]; *Midgett v. Brooks*, 34 N. C. (12 Ired.) 145 [55 Am. Dec. 405]; Rawle, Cov. Title 164, 165, 166, 167; *Frost v. Raymond*, 2 Caines 188 [2 Am. Dec. 228]; *Akerly v. Vilas*, 23 Wis. 207 [99 Am. Dec. 165]; *Bostwick v. Williams*, 36 Ill. 65 [85 Am. Dec. 385]; 3 Washburn, Real Prop. (4 ed.) 469; *Craig v. Heis*, 30 Ohio St. 550; *Hill v. Butler*, 6 Ohio St. 207; *Kyle v. Thompson*, 11 Ohio St. 616; *Andrews v. McCoy*, 8 Ala. 920 [42 Am. Dec. 669]; 4 Enc. Law & Proceed. 34; *Baily v. Smith*, 14 Ohio St. 396 [84 Am. Dec. 385]; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Silverman v. Bullock*, 98 Ill. 11; *Timmerman v. Howell*, 1 Circ. Dec. 342 (2 R. 27); *Michener v. Cavender*, 38 Pa. St. 334 [80 Am. Dec. 486]; *Bloomer v. Henderson*, 8 Mich. 395 [77 Am. Dec. 453]; *Horstman v. Gerker*, 49 Pa. St. 282 [88 Am. Dec. 501]; 27 Enc. Law & Proceed. 1324; 2 Parsons, Notes & Bills 46, 47; *Smith v. Ewer*, 22 Pa. St. 116 [60 Am. Dec. 73]; *Merrill v. Merrill*, 3 Greenleaf 463 [14 Am. Dec. 247]; *Second Nat. Bank v. Hemingray*, 31 Ohio St. 168; *Follett v. Buyer*, 4 Ohio St. 586; 2 Parsons, Bills & Notes 603, 609; 4 Enc. Law & Proceed. 33, 34; Waterman, Set-off (2 ed.) 132; 2 Randolph, Com. Papers 296, Sec. 657; Wade, Law of Notice 192, Sec. 440; *Armstrong v. Warner*, 49 Ohio St. 388 [31 N. E. Rep. 877; 17 L. R. A. 466]; *Fuller v. Steiglitz*, 27 Ohio St. 355 [22 Am. Rep. 312]; *Barbour v. Bank*, 50 Ohio St. 90 [33 N. E. Rep. 542; 20 L. R. A. 192]; *Brashear v. West*, 32 U. S. (7 Pet.) 608 [8 L. Ed. 802]; *Crosby v. Kropf*, 33 N. Y. App. Div. 446 [54 N. Y. Supp. 76].

CAMERON, J.

A jury having been waived, this case was heard and submitted to the court upon an agreed statement of facts, ably argued by counsel orally and upon briefs.

That we may apply the law applicable to the facts, as we understand it to be, a brief statement of the facts will, we believe, be con-

Putnam Common Pleas.

ducive to a clear understanding of the legal questions involved and the law applicable to their proper solution.

THE AGREED FACTS.

On August 18, 1903, John Merchant, for the consideration of \$6,380 to him paid and secured to be paid, executed and delivered to N. W. Ogan his certain warranty deed of that date and thereby conveyed to said Ogan in fee simple, the lands described in plaintiff's petition. That at the time of the execution and delivery of said deed, Ogan, to secure the balance of unpaid purchase money for said lands so sold and conveyed, executed and delivered to said Merchant his two certain non-negotiable promissory notes in the sum of \$2,000 each payable in one and two years, with interest thereon, and each bearing date of August 18, 1903, and being the same notes described in plaintiff's petition. On September 8, 1903, Merchant, for full value to him paid, sold and delivered said two notes and the mortgage securing the same, to the plaintiff and then endorsed said notes in blank and assigned and transferred the mortgage securing the same to the plaintiff. That at the time the deed, notes and mortgage were executed and delivered, a dwelling house, outbuildings and fruit trees were standing on sixty acres of the land so conveyed and on the night of August 19, 1903, said buildings and certain of said fruit trees were destroyed by fire while in the possession of said John Merchant and that afterwards, and on August 22, 1903, N. W. Ogan duly commenced an action in this court numbered 9159 against said John Merchant to recover the value of said buildings and trees. That such further proceedings were had in said case, that on April 21, at the April term of said court, 1904, said Ogan, by the consideration of this court, recovered a judgment against said John Merchant for the sum of \$700, debt, and the further sum of \$59.63, costs.

That at the time plaintiff purchased said notes and mortgage sued upon in this action, it had no notice or knowledge of the claim set up and sued upon by N. W. Ogan in his action against said John Merchant (cause No. 9159), nor did plaintiff have any notice or knowledge of such claim until September 9, 1904.

That said N. W. Ogan had no notice or knowledge of the transfer of said notes and mortgage or the transfer of either of them to plaintiff or any one else until September 9, 1904.

That on September 15, 1903, John Merchant left the state of Ohio, and has ever since been and still is a nonresident of said state, nor has he, since leaving said state, had, nor has he now any property or property rights in said state and that his residence and whereabouts have been at all times and still are unknown to the parties hereto. That the judgment obtained by Ogan against Merchant in cause No.

9159, is unpaid together with costs which have been paid by N. W. Ogan.

That, if upon the issues joined the court should find for the plaintiff, the finding shall be in the sum of \$759.63, with interest from April 4, 1904, at 6 per cent.

It is further agreed that the plaintiff waives any claim or decree upon the mortgage and that the action is to proceed upon the notes against the administratrix of N. W. Ogan, deceased.

Upon these facts, the defendant claims that the judgment obtained by Ogan against Merchant in cause No. 9159, should be set off against the notes upon which the plaintiff's action is founded.

The right to have this judgment so applied as a set-off against the notes is denied by the plaintiff; and thus arises the question which we are now called upon to decide.

Section 5071 Rev. Stat., defining set-off, provides:

"A set-off is a cause of action existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court, and can only be pleaded in an action founded on contract."

Section 4993 Rev. Stat. provides:

" * * * but when a party asks that he may recover by virtue of an assignment, the right of set-off, counterclaim, and defense, as allowed by law, shall not be impaired."

Section 5069 Rev. Stat., defining counterclaim, provides:

"A counterclaim is a cause of action existing in favor of a defendant, and against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

The controlling question in the case as presented by the agreed facts, is this:

Can the judgment recovered by Ogan against Merchant on April 21, 1904, be offset or counterclaimed against the notes upon which the plaintiff's action is founded?

The action in which the judgment sought to be set off against the claim of the plaintiff, was commenced by Ogan against Merchant, on August 22, 1903.

This was an action wherein Ogan sued Merchant for the recovery of damages alleged to have been sustained by the negligent and wrongful destruction of the dwelling house, outbuilding and certain fruit trees near said buildings belonging to Ogan, by said Merchant, who it is alleged, burned the same.

While it is true that the petition in that case avers that, for a valuable consideration, Merchant conveyed the lands therein described

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to Ogan in fee simple by his warranty deed, yet it is manifest from the reading of the petition that the action was not for a breach of the covenants of the deed, but was an action sounding in tort.

While that action was pending, and on September 8, 1903, Merchant for full value to him paid, sold, transferred and delivered the two notes and the mortgage securing the same to the plaintiff. It is agreed by the parties in the present suit, that the plaintiff had no notice or knowledge of the claim that was being asserted by Ogan in his action against Merchant until long after the assignment of the two notes and the transfer of the mortgage securing the same to plaintiff, that is to say, not until September 9, 1904. I will here add that Ogan, also, had no notice or knowledge that the two notes and the mortgage had been transferred by Merchant to the plaintiff or anyone else until September 9, 1904.

Keeping in mind the facts in this case, and looking beyond them to the pleadings, also, we will determine the law applicable thereto as we understand it.

The law is well settled, that the assignee of non-negotiable paper takes it subject to all the equities and defenses existing between the debtor and creditor at the time of the transfer.

This being true, the first pertinent inquiry is, whether the claim made by the defendant, at law, constitutes a set-off before reduced to judgment; and whether, under the agreed facts in this case, the principles of an equitable set-off can be invoked.

In *Mead v. Gillett*, 19 Wend. 397, the court, speaking by Nelson, C. J., said:

“Where an action is brought upon a contract (other than a negotiable promissory note or bill of exchange) which has been assigned, in the name of the assignor for the benefit of the assignee, the defendant can set off only such demands as existed against the assignor and in good faith belonged to the defendant at the time of the assignment;—demands subsequently acquired cannot be set off, although the defendant become the holder of them without notice of the assignment.”

At page 398 it is held:

“The judgment in his favor (defendant) had not then been obtained; besides, it was a judgment for a tort, and until its rendition he cannot be considered as having a demand within the meaning of the statute of set-off.”

After a reference to the section of the statute relating to set-off, the judge announcing the opinion of the court, says:

“The section (of the above statute) referred to authorizes a defendant in an action founded upon a contract (other than negotiable paper) which has been assigned to a third person, to set off a demand

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belonging to him in good faith before notice of assignment;—but it must be a demand which was in existence against the plaintiff at the time he made the assignment. A debt accrued subsequently is impliedly excluded; the legislature undoubtedly believing in such case that the equity of the assignee was the strongest, even in the absence of notice to the defendant.”

I quote from the case of *Martin v. Kunzmüller*, 37 N. Y. 396, where it is held:

“An allowance to a party by way of set-off, is always founded on an existing demand *in presenti* and not on one that may be claimed *in futuro*.

“In an action by an assignee, the defendant cannot offset a note made by the assignor which fell due after the assignment of the subject of the action was made.”

Same case and authorities cited. See, also, *Waterman*, Set-off Sec. 99; *Myers v. Davis*, 22 N. Y. 489.

The New York statute, relating to set-off, while differing from ours in phraseology, in meaning is substantially the same.

Before citing and referring to decisions from our own and other states, I will refer to the facts and decision in the case of *Roberts v. Carter*, 38 N. Y. 107.

In this case, Roberts brought an action against Carter for damages for a tort. At the same time Carter brought an action against Roberts for rent. Both actions were pending at the same time. The referee to whom the actions were referred, reported in both cases in favor of each plaintiff respectively. On the same day, without fraud or collusion, Carter assigned his claim to Terry for a valuable consideration and on application of Terry, judgment was entered in his name. Subsequently Roberts perfected his judgment against Carter on which executions were issued and returned unsatisfied. This action was brought by Roberts to compel a set-off of the judgment obtained against him by Carter toward the judgment obtained by him against Carter.

Upon this state of facts the court of appeals held:

“That Roberts had no right to such set-off at the time of the assignment of the claim against him, and that he acquired no such right subsequently.”

At page 108, Judge Woodruff, speaking for the court said:

“Upon these facts, I am unable to perceive, that, on July 21, 1857, when the defendant Carter assigned his claim for rent to the defendant Terry, the plaintiff had any title, legal or equitable, to the set-off which, in this action, he claims, and, if not, then, he certainly did not acquire any right after such assignment took place.”

“At law, his right of set-off did not exist. He was sued for

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money due upon contract. He was suing to recover damages for a tort; as to such claims, no right of set-off existed."

I quote further from this opinion at page 109, as follows:

"On the day of the assignment, no right of set-off existed. It was only upon the entry of judgment, that the plaintiff came into a situation to claim a set-off, either by motion or bill in equity, and before that time the claim of Carter had been assigned, for a valuable consideration, to his attorney, the defendant Terry. *Non constat*, at that time, that the plaintiff would recover a judgment.

"It may be conceded, that Terry took the assigned claim, subject to all the equities which then existed, in favor of the plaintiff." * *

* But, at that time, no equities did exist, according to any facts proved or found in the case, if the opinion of the judge at special term may be consulted to ascertain what he did find."

In *Chambers v. Wright*, 52 Ala. 444, it was held:

"That damages arising out of tort cannot be the subject of a set-off in equity."

"The Supreme Court of Indiana in *Avery v. Dougherty*, 102 Ind. 443 [2 N. E. Rep. 123; 52 Am. Rep. 680], stated the general rule as follows:

"The general rule is, that a tort cannot be made to constitute a defense by way either of set-off or counterclaim."

To the same effect are the decisions, *Lovejoy v. Robinson*, 8 Ind. 399; *Slayback v. Jones*, 9 Ind. 470; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Terre Haute & Ind. Ry. v. Pierce*, 95 Ind. 496-500.

"A claim arising *ex delicto* is unavailable as a set off." *Boyer v. Clark*, 3 Neb. 167.

"Equitable demands existing in favor of the maker of a note against the payee may be set off against the assignee, when such demands existed in favor of the maker before the assignment." *Colyer v. Craig*, 50 Ky. (11 B. Mon.) 73.

In *Zeigelmüller v. Seamer*, 63 Ind. 488, it is held:

"A claim arising out of a tort cannot be pleaded as a set-off to an action on account."

"Such a claim cannot be pleaded by way of set-off, against a cause of action upon or arising from contract, if it can in any case."

To the same effect are the decisions, *Indianapolis & C. Ry. v. Ballard*, 22 Ind. 448; *Roback v. Powell*, 36 Ind. 515; *Harris v. Rivers*, 53 Ind. 216; *Robison v. Hibbs*, 48 Ill. 408; *Boil v. Simms*, 60 Ind. 162.

An examination of the decisions of our own courts shows that they are in harmony with the decisions of courts of other states, upon this subject.

In *Whims v. Grove*, 1 Circ. Dec. 59 (1 R. 98), the circuit court of the second circuit held:

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"In an action against the maker by the holder of a non-negotiable note, received by endorsement from the payee in good faith, for value, and before maturity, the maker is not entitled to set off an independent past due claim, purchased by him against the payee of such non-negotiable note after the same had been so transferred to such holder, and before the maturity thereof."

At page 60, the court say:

"In other words, there is a right of set-off only when a cross demand exists between the same parties at the same time in the same right, and on which either could, at the time, maintain an action against the other."

This decision is in line with Sec. 5071 Rev. Stat. heretofore cited. *Waterman, Set-off, supra*; *Pomeroy, Remedies, Sec. 198, et seq.*

The case of *Fuller v. Steigletz*, 27 Ohio St. 355, seems to be pertinent to the question under consideration; I quote Syl. 1:

"The assignment of a non-negotiable demand arising on contract, before due, defeats a set-off by the debtor of an independent cross demand, on which no right of action had accrued at the time of the assignment."

The court, at page 361, quotes with apparent approval *Waterman, Set-off Sec. 99*, where it is said:

"Until a demand becomes due the set-off or counterclaim may be defeated by assignment by the opposite party of his claim, though the latter be insolvent, and his demand has not been payable when assigned."

The court, in this case, cites and quotes with approval, *Martin v. Kunzmilller*, and *Roberts v. Carter, supra*, and other cases from which we have heretofore quoted.

Defendant's counsel claim an equitable set-off by reason of the broken covenants for quiet enjoyment, etc., in the deed from Merchant to Ogan. Many cases are cited in support of this contention. In most, if not all the cases so cited, the covenants for quiet enjoyment were broken on account of the failure of title.

In the case at bar, it must be remembered that no such claim is made in the pleadings. I have been unable to find any averment or allegation that any covenant for peaceable and quiet enjoyment of said premises had been broken. If we turn to the agreed facts, we find no evidence to sustain any such claim. The transaction between Merchant and Ogan had terminated. The deed from Merchant to Ogan had been made and delivered,—the cash payments and the notes and mortgage evidencing and securing balance of purchase money for the premises conveyed, had likewise been executed and delivered. The entire business of selling and buying the lands had been consummated.

The judgment sought to be set off in this case, did not grow out of or was it in any manner connected with this transaction; nor is it alleged or proven that the judgment of \$700 against Merchant, was the offspring of a broken covenant but was in truth and fact the result of an action in tort. It does not, in my judgment, under such circumstances, become available as an equitable set-off, counterclaim or defense.

I agree with defendant's counsel that plaintiff took these notes subject to any equities existing between the maker thereof and the payee therein at the time of the assignment. But, under the agreed facts, what equities then existed? There was at that time, pending in this court, an action wherein Ogan was plaintiff and Merchant was defendant, in which Ogan was claiming damages against Merchant for the unlawful destruction of his property. Merchant had answered denying all liability. The action was one for damages for tort. Issue had been joined. Whether this action would terminate in a judgment in favor of the plaintiff, was then problematical. Under such circumstances, we are unable to see any equities between the original parties to these notes that could, as a legal or equitable set-off, now be asserted against the assignee who acquired the notes for full value seven months before judgment was obtained in the case.

Again the notes sued on were not due when this action for damages was pending,—not due when judgment was taken therein, and for months thereafter.

If, then, no set-off or counterclaim existed at the time of the assignment, none that might thereafter arise would, or could, in our opinion, be available as against the rights of the assignee. In other words to be available as a set-off, as against the rights of the assignee, it must be an existing claim *in presenti* and not *in futuro*.

Had Merchant remained the owner of the notes and if judgment had been obtained thereon by him against Ogan, then, in equity, one judgment might have been set off against the other.

Believing that the conclusions reached are in harmony with the authorities, and in accordance with the evidence upon which the case has been heard, there will be a finding in favor of the plaintiff for the sum of \$759.63 with interest from April 4, 1904, at 6 per cent, as stipulated in the ninth paragraph of the agreed statement of facts.

Judgment accordingly.

EXECUTORS AND ADMINISTRATORS.

[Ashland Common Pleas, July 20, 1909.]

IN RE G. A. ULLMAN, EXR. EST. OF MARY F. FREER.

1. EXECUTOR IN MANAGEMENT OF ESTATE FOR FIXED FORM CANNOT CHARGE THE ESTATE COST OF VALUABLE IMPROVEMENTS.

Where real estate is devised to certain persons, but the executor is given the management and control thereof for the benefit of the estate for five years after the death of the testatrix, he may charge the estate for such repairs as were necessary to maintain the rental value of such real estate during said period, but the estate cannot be charged with the cost of valuable improvements thereto.

2. EXECUTOR REQUIRED TO ITEMIZE ACCOUNT OF RENTAL OF BUSINESS BLOCK.

Where an executor has collected the rents from a business block and paid taxes, insurance and repairs thereon, his account must show each item of such receipt and expenditures, and where he merely charges himself with a certain amount as the net income therefrom, he will be required to file an itemized supplemental account.

3. ATTORNEY FEES LIMITED TO PAYMENT OF NECESSARY AND PROPER SERVICES TO ESTATE.

The court does not determine the fees which an executor may pay his attorney, but it will only allow him to charge the estate with reasonable attorney fees for such services as were necessary and proper in the settlement of the estate.

W. S. Kerr, C. H. Workman and George Frey, Pros. Atty., for exceptor, Ashland county commissioners.

F. N. Patterson and C. P. Winbigler, for Ullman, Exr.

WEYGANDT, J.

Mary F. Freer died July 13, 1901, leaving an estate of approximately \$100,000, which is all disposed of in her will made some years before. Her will was duly probated, and George A. Ullman qualified as executor, and on October 14, 1907, filed his first and final account. To this account exceptions were filed, and upon application, the matter was certified to this court for hearing. After making a number of bequests and devises, the testatrix bequeathed all the residue of her estate to trustees for the purpose of establishing a Children's Home in and for Ashland county. It appears from this account that this residue amounts to \$1.44.

The commissioners of Ashland county, who were to act with the trustees named in the will in the establishment of this home, filed exceptions to this account, accepting to the allowance of attorney's fees paid to Judge Campbell, Judge McCray, and Senator Patterson, to the allowance of \$9,000, compensation to the executor in addition to the amount allowed him in the will, to the failure of the executor to account for all the rents, profits, and assets of this estate, to his

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- failure to account for interest on funds in his hands while acting as executor, and to his failure to file proper vouchers with his account.

The vouchers filed with this account are merely receipts from the various persons to whom payments were made as creditors or legatees. While these receipts are not what are ordinarily understood to be vouchers, yet I know the practice in many counties has been for the probate court to furnish to executors and administrators just such vouchers and receipts as are filed with this account, and nothing more has usually been required. The account itself briefly indicates for what purpose most of these payments were made, and this, in connection with the receipts filed, I am inclined to hold is a sufficient compliance with the law, in view of the well known practice in many of our probate courts.

Executors also charge that the executor has failed to account for all the assets, rents and profits of this estate. The evidence falls short of establishing any claim of this kind. As nearly as I can calculate, the rents and profits accounted for by the executor amount to \$11,075.56. This does not include the sum of \$1,324.34, which is reported as the net income from the Freer block. The evidence offered is mere opinion of the various witnesses as to the probable income from the several properties, or the rental value of the different farms. This is too serious a matter to warrant a court indulging in a guess as to the amount for which this executor should account. Therefore, this court will not, upon the evidence offered, disturb this account on the question of rents and profits. The same may be said of the charge that the executor has failed to account for all the assets of this estate which came into his hands. If he has failed to account for any part of the money, stocks or other property of the estate, the evidence fails to show anything unaccounted for.

In what I have said on the question of rents and profits, I have not taken into consideration the rentals of the Freer block. The account shows only a lump sum of \$1,324.34, which is claimed to be the rentals from this block, after deducting the taxes, insurance, improvements and repairs. What those improvements or repairs were and the cost of the same does not appear in this account. Those interested are asked to be satisfied with the mere statement of a certain sum due this estate with no items of either receipts or disbursements covering a period of five years. If this be a sufficient accounting, why was this estate not saved the expense of this long account by filing a statement that there was the sum of \$1.44 remaining in the hands of the executor awaiting the pleasure of these trustees and commissioners, who were to erect a children's home with the amount so remaining after the payment of all the legacies provided for in this will. The evidence shows that one of the business rooms in this block rented for

\$350 per year, another for \$400 per year, and the third room for \$450 per year. The rooms on the second floor rented for \$75 each after 1904. Prior to that time, two of them rented for \$50 per year, each, and the other for \$60 per year. In five years this block yielded to this executor and the other owners of the block, \$6,930. The executor was entitled to one-half of this amount. The one-half of the taxes for the same years was \$585.60. Deducting the taxes from the one-half of \$6,930, leaves a balance of \$2,879.40.

As I have already stated, the executor charges himself with the sum of \$1,324.34. Deducting this amount from \$2,879.40, leaves the sum of \$1,555.06, which, so far as I can discover from an examination of this account, the beneficiaries of this estate are expected to guess what has become of it. The evidence shows that some part of this was expended for repairs and improvements but the account does not. This executor received this money, and these beneficiaries are entitled to know what he did with it. It will not do to say that it was honestly expended and that the estate received the benefits from such expenditure. The law very wisely does not leave these matters wholly to the judgment and honesty of an executor or administrator. Standards of honesty may differ, and those interested in an estate cannot be bound by the judgment and discretion of an executor or administrator unless it has been so wisely exercised as to command the approval of the court to which he is required to give an account of his stewardship. How can a court know or pass upon these matters intelligently when nothing appears in the account to advise the court how or for what purpose the assets of this estate have been expended. We gather from the evidence that this executor has books which would explain these expenditures. The intent of the law is that these things should appear in the account for the information of those interested and not locked up in the strong box of the executor. This law is intended not only for the protection of the estate, but for the protection of the executor, his heirs and bondsmen, when he is no longer here to explain what might otherwise appear to be a misappropriation of the funds of the estate. This account is insufficient in this respect, and a supplemental account must be filed within thirty days itemizing the receipts and expenditures from and for the Freer block.

The executor was called as a witness but he refused to testify because he is under indictment for embezzling the funds of this estate. This is a privilege or right the law allows him, and he has a right to avail himself of it if he so desires. It appears from the evidence that he is the only person that might be able to explain some of the matters in dispute in this account. This explanation is withheld because he chooses rather to take advantage of the privilege the law allows him. This is a constitutional right, and no court can invade this right by requiring any

citizen to be a witness against himself when charged with crime. Under such circumstances it is difficult for me to find fault with the executor, but I will take occasion to say that Judge McCray and Senator Patterson are also under indictment for the same offense, but they have not hesitated to take the witness stand and testify in this hearing. If a man feels justified in what he has done, he naturally seeks the first opportunity to make public explanation of his acts and conduct when his honesty and integrity are assailed. I sincerely hope and trust that this executor may be innocent of any criminal intent in this matter, but I am equally free to say that his conduct does not impress one that he has an abiding faith in his ability to honestly and intelligently account for his stewardship, nor does it commend him to the favorable consideration of this court when called upon to find that his services in the administration of this estate were of extraordinary value.

The testatrix devises her one-half interest in the Freer block to the four sons of her brother-in-law. These sons, as I understand it, already owned the other undivided one-half as heirs or devisees of their father. The executor was required by the will to give possession within five years after the death of the testatrix, and until he yielded up possession to these devisees, I think it was his duty to pay his share of all repairs necessary to maintain the rental values of these rooms as they were at the death of the testatrix, and the estate is properly chargeable with the costs of these repairs. Beyond that he had no right to go. He could not improve this block for the benefit of the devisees. This difference is apparent between the improvements made on the Freer block and the improvements made on one of the farms of the testatrix. The improvements made on the barn on the farm would naturally enhance the value of the farm when it was sold later, and the estate would be benefited to that extent. The estate derived no benefit whatever from the improvements made on the Freer block; at least the executor has in no way shown to this court that the estate derived any benefits from these improvements. No higher rents were obtained and there is no showing that the rents would have been diminished if these improvements had not been made. What were these improvements? Senator Patterson testifies that there were new fronts put in all these rooms on the first floor, and the back room of the bank was repaired; they put in a new floor in the bank and new fixtures, and a new safe, and he thinks a new vault; everything inside was new; a new mosaic floor put in; new carpet in the back room, new plumbing, and walls redecorated. No other conclusion can be drawn from the evidence than that all these improvements were paid for, out of the estate of Mary F. Freer—that is the one-half of the cost was borne by this estate. How was this estate benefited by such improve-

ments, when the block was specifically devised to Freer brothers? They alone profit by this expenditure of money, and this estate should bear no part of the cost of same. It would be a most unconscionable rule of equity that would charge up the expense of improving the property of this bank to the orphans of Ashland county. The evidence does not satisfactorily disclose what the cost of these improvements was, but the supplemental account which the executor will be required to file will afford this explanation. Whatever these improvements cost must be credited to this estate and the executor charged with that amount.

Exceptors also ask that the executor be charged with interest on the cash balances on hand, at the end of each year. There is no showing that he received any interest on any of the funds of this estate, and the will permitted him to withhold distribution of the greater part of this estate for five years, and there does not appear in the will any intention on the part of the testatrix that he should account for interest while distribution was delayed. Nevertheless, if he loaned any part of the funds of this estate, while the will contest was pending, or while in his hands awaiting distribution, he should be charged with the interest received. As I have already said, the evidence does not show that this has been done, therefore the exceptions to this must be overruled.

Exceptions are filed to the various allowances for attorney's fees; separate exceptions being taken to each and all of the items. I shall, however, for the sake of brevity, treat this allowance as one sum. The aggregate of the several items is \$9,557.20. Of this amount \$2,400 was allowed to Judge Campbell, but he has withdrawn all claim to any part of this, so that said claim will be charged against this executor.

The remainder \$7,157.20 was paid to Judge McCray and Senator Patterson, for legal services in the action to contest this will, and generally for all services rendered this executor in the settlement of this estate. It is always prudent to secure the advice of an attorney in the settlement of an estate, because executors and administrators are not usually men learned in law, and difficult questions frequently arise in the administration of estates, which may sooner or later involve the estate in costly litigation if the executor or administrator through ignorance of the law, should go astray. At the same time the estate must not be needlessly burdened with the payment of exorbitant and unnecessary attorney's fees. The executor must observe the same precaution and exercise the same sound discretion in this as in the allowance of any other claim against the estate. The court will examine into these matters as carefully as into any other arising in the settlement of the estate. The court cannot control what an executor or administrator may choose to pay for legal services, but it will not permit

the estate to be charged with unreasonable fees. In other words the court does not fix the amount of the attorney's claim against the executor but it will determine the amount it will allow the executor to charge the estate with, although the amount paid by the executor to his legal advisor may be largely in excess of the amount deemed by the court to be reasonable. This is just and right because the services rendered by the attorney may be more valuable to the executor than to the estate. When he accepts the trust he is charged with the faithful administration of that trust before he is entitled to compensation. He may also become liable on his bond if he fails to administer the estate according to law. For these reasons and others that will suggest themselves, the services of an attorney may be valuable to the executor, but of little or no value to the estate. The courts, however, do not always keep this distinction in mind when making an allowance to an administrator or executor for the service of an attorney in the settlement of estates.

This will was attacked by some disappointed relatives, and the executor assumed the burden of defending or maintaining it. He was successful and now asks that the estate be charged with the fees of the attorneys employed by him to defend the will. It is urged upon the court that Mr. Ullman deserves great credit for voluntarily assuming the defense of this will for the benefit of others who would not have shared in this estate but for the will. It does not appear that the commissioners, the school board or the churches of Ashland manifested much interest in this will contest, although, if the will had been set aside they would have lost the legacies which have since been paid them by virtue of this will. In view of the fact that this will, as Mr. Ullman construed it, as appears from his account, gave him more than \$18,000, thereby making him very largely the chief beneficiary of this will, this court is unable to find that the motive which prompted him to assume the contest of this will was wholly the result of an unselfish desire to protect and maintain the rights of others. However, as I have said, this will was sustained and the estate of Mary F. Freer distributed as she had directed, and I am inclined to allow him a reasonable amount for the services of his attorneys rendered in the action to set aside the will, as well as for other services rendered him in the settlement of this estate. It appears from the evidence that he contracted and agreed to pay Judge McCray \$3,500, for his services if the will was sustained. The will was sustained and Judge McCray is entitled to his pay according to the contract, so far as this court is concerned, but this estate cannot be charged with any such sum for the services so rendered by Judge McCray. Outside of this will contest, I think the services rendered by Judge McCray were trifling.

in view of the fact that the executor had already secured the services of able counsel to direct and advise him as to other questions that might arise in the collection and disbursement of the assets of this estate. If Mr. Ullman's business ability was such as to command the extravagant compensation allowed him by the testatrix for the settlement of her estate, I can see very little use for the services of an attorney except in the cases of the will contest and the suit on the claim of Fanny Gilbert.

A suit to contest a will is always an important one, and when the mental capacity of the testator is questioned, it is usually a difficult one to prepare and try, because the testimony of expert physicians must be secured as well as met in the trial of the case. No one who has not gone through the preparation of a case of this kind can realize or appreciate the labor required to properly prepare for trial, and in this case we must assume that the proper preparation was made because the defense was successful. People generally measure a lawyer's services by what they see in the court room, when the work done there usually represents but a small part of the work actually done. The successful trial of a law suit does not depend so much upon the conduct of the trial in court as upon the thoroughness of the preparation beforehand. The undisputed evidence in this case shows that McCray and Patterson spent much time in interviewing witnesses, looking after the taking of depositions, and the investigation of questions of law that would be likely to come up in trial. All of these things should be done in the preparation of a case for trial, and were done in this instance. The five days consumed in the trial of this case represent but a small part of the labors of these attorneys in this case. For all of this they are entitled to compensation, and their services while in their offices engaged in the preparation of their case is just as valuable, as the services rendered in the court room during trial.

Attorneys were called to testify as to the value of the services rendered by Judge McCray and Senator Patterson to this executor. They fix the value of the services of the former at \$500 per day, and of the latter at \$400 per day. As to this evidence it is sufficient to say that such compensation for attorney's services in this part of the state is never met with in actual practice and finds no support save alone in the active and fertile imagination of the expert witness. Such fees for such services are grossly unreasonable as measured by the fees honestly obtained by practicing attorneys in this section of the state, and in no reported case that I have examined, have any such fees been allowed for similar services even in larger estates and where the ability of the attorneys would, at least, compare favorably with that of the

attorneys claiming these fees in this matter. Many people have come to regard an attorney's license to practice as a license to commit grand larceny with impunity, and such transactions as this, unfortunately support this slander against a profession that, for honesty and integrity, ought to rank first of all. Senator Patterson acted as counsel for this executor throughout the settlement of this estate, and is therefore entitled to a larger fee than Judge McCray. As has been urged by counsel, the Children's Home ought not to be compelled to bear the entire burden of maintaining this will nor the entire expense of administration. In some respects this is true; but some of the beneficiaries of this will would have taken, by operation of law, a larger share of this estate than they receive under this will. Certainly they were not interested in maintaining this will, and ought not to pay any part of the expense of doing so. Many other legatees receive only small sums, and have already received their legacies, and will not now be charged with any part of these expenses. It appears from this account and the will, that the Children's Home has already received a farm of ninety-four acres in addition to the \$1.44. This farm is probably worth \$8,000 to \$10,000, and was appraised at something over \$7,000. Outside of those who would have been entitled to a share in this estate if there would have been no will, the Children's Home and this executor are the chief beneficiaries, and upon them must fall the burden of these expenses. The executor has already paid Judge McCray what he contracted to pay him, and to Senator Patterson what he thought his services were reasonably worth, and so far as this court is concerned, I will not, nor have I any right to disturb their settlement, but this executor will be allowed to charge this estate for the services of Judge McCray the sum of \$1,000, and Senator Patterson for his services, the sum of \$1,500, and no more. In respect to these items in this account, he has credited himself with the sum of \$7,157.20. I find that this estate should be charged with but \$2,500, and this estate must, therefore, have credit for the difference between these amounts, or the sum of \$4,657.20, and this executor is accordingly charged with said amount.

Testatrix, by her will allows to this executor 10 per cent of the appraised value of her estate as compensation, and further provides that after the first year he shall have such additional compensation for managing her estate as shall be reasonable.

The appraised value of this entire estate is \$93,632.99. Under the will this executor takes 10 per cent of this amount, or \$9,363.20. In addition to this he charges this estate \$9,000 under the further provision of the will that he shall be allowed such further compensation for managing the estate after the first year as may be reasonable.

Exceptors claim that the additional compensation charged is unreasonable and that he ought to account for the difference between a reasonable additional compensation and the additional compensation charged. What then is a reasonable compensation for the management of this estate after the first year? I am unable to find that the services of this executor were materially different from those ordinarily required of persons serving in like capacity. It is true that this estate was much larger than estates usually are in this county, but the law takes care of that by allowing to executors compensation in proportion to the amount of the estate. The compensation provided for the executor by the testatrix is excessively large, and much more than this court would allow him were it not for the will. I feel that some additional compensation must be allowed him, because the testatrix has said that it should be done, and I must obey her direction. I know of no better rule to follow in determining what this additional compensation should be than the rule fixed by Sec. 6188 Rev. Stat. This executor collected and disbursed \$43,313.70. The statutory compensation would amount to \$986.27, and this is all this court can allow him by way of additional compensation. Were it not for this will it is doubtful whether, under the law, this executor should be allowed anything for his services. In brief, his account may be summed up in these words:

“I have collected, in round numbers, \$43,000. I have paid out the legacies, paid attorneys, \$9,500, taken over \$18,000 for myself, and now have left \$1.44, with which the commissioners may build a Children's Home.”

With this balance staring one in the face, should this court say, “Well done good and faithful servant,” or “take from him the talent which he already has”? I shall do neither, but content myself with sustaining these exceptions to the extent already indicated. It is the duty of courts to jealously guard the administration of estates, and the Ullman method of administration of estates cannot be too severely condemned. This woman intended that a substantial portion of her estate should be devoted to the erection of a home for the orphans of Ashland county—a home that would indeed be a monument to her memory. Her benevolent intentions were thwarted by the squandering of her estate. If she intended the result reached by this executor, she certainly has perpetrated a grim joke upon the people of this county. Who but this executor believes that she had in mind a \$1.44 home for the unfortunate children of her county. This shameful extravagance in the administration of estates must cease, and confidence in our courts be restored.

To summarize, the balance due this residuary legatee, I find to be as follows:

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Balance due, as shown by the account of executor..\$	1.44
Claim of Judge Campbell withdrawn.....	2400.00
Overcharge on fees to McCray and Patterson.....	4657.20
Overcharge by executor for compensation	8013.73
<hr/>	
Total	\$15072.37

To this amount must be added when ascertained, the one-half of the total cost of the improvements made on the Freer block. As stated before, the executor must file a supplemental account itemizing the receipts and expenditures in connection with the Freer block, and from this we can ascertain the costs of these improvements. This must be done within thirty days, and exceptions thereto may be filed within ten days thereafter, and for that purpose this matter is continued for further hearing upon that question alone. I have found that \$1,555.06 of the rentals of this block are accounted for by the executor, and should he fail to file a proper supplemental account within the time allowed him, he will be further charged with said sum, and the amount found due this residuary legatee fixed at the sum of \$16,627.43. The executor must be charged personally with the costs of this hearing.

ON EXCEPTIONS TO SUPPLEMENTAL ACCOUNT.

In the former hearing of this matter, the executor was required to file a supplemental account setting out an itemized statement of the receipts and expenditures from the Freer block. This, he has done to the entire satisfaction of this court, because it is such an account as the law requires of executors and administrators for the information and benefit of those interested in an estate. Exceptions have been filed to certain items of this supplemental account, and from what I stated in my former opinion, certain of these exceptions must be sustained for the reason that the expenditures excepted to are for improvements to this property rather than for necessary repairs.

Exceptions are filed to two items of \$5, for hauling sand, and \$11.50, for brick. It appears from the evidence that a part of the foundation wall of this building had fallen in, and the sand and brick were used in repairing the same. The exceptions to these two items are overruled. The commissioners except to the allowance of the item of \$274.10 for a new roof. At the time of the opera house fire, the roof of this building was damaged to such an extent that the insurance companies adjusted the loss, and paid to the executor substantially what it cost to put on the new roof. Exceptions to this item will be overruled.

As to the item of \$184.93, for a new furnace and chimney it appears from the evidence that the old furnace had become practically

Ullman, in re.

worthless and furnished more smoke than heat to the occupants of the building, and this was its condition at and before the death of Mary Freer. From the evidence it appears that the old furnace lasted about ten years, and as this estate had the benefit of this furnace for five years, I think it would be equitable and just that one-half of the cost of this new furnace should be charged in this supplemental account, the estate being charged with but one-half of the amount of the items allowed therein.

The exceptions to all the other items are sustained for the reason that they appear to be improvements rather than necessary repairs. Throughout this account there are many items for wall paper, painting, hardware, and repairs of various kinds which I think are all that this estate should be charged with. Some claim is made that the rents of the upstairs rooms were increased because of some of these improvements. This may be true in part, but George Freer, who was certainly a very fair and honest witness, says that there was a general advance of rents in Ashland, and I think whatever increase of rents there was, was due to this rather than to certain improvements, which were, no doubt, very acceptable to the tenants, but not of sufficient importance to warrant the claim that the increase in rents was wholly due thereto.

In my former finding, the executor was charged with the sum of \$15,072.37, exclusive of what might be found unaccounted for from the rents of the Freer block. It is, therefore, the finding of this court that there is due the residuary legatees, the commissioners and the trustees for the Children's Home, as follows:

Balance by former finding	\$15,072.37
C. W. Rolling, furnace and chimney, 1-2...	\$ 92.47
Soles Bros., plumbing	17.40
McCready Hardware Co., glass	103.00
Shearer, Kagey & Co., front	205.00
McCready Hardware Co., skylight, glass...	105.30
Christ Jensen, frescoing	340.00
Soles Bros., plumbing	105.00
Thomas, papering and painting	46.25
Beach & Brown, wall paper	25.00
Thos. McNeeley, bank front	225.45
Ashland Hardware Co., stove	30.23
<hr/>	
Total	\$1,295.10
One-half of \$1,295.10, said estate having paid but one-half of said items	\$ 647.55
<hr/>	
Total	\$15,719.92

Interest from Oct. 14, 1907, to July 20, 1909.....\$ 1,666.31

Whole amount of judgment to date\$17,386.23

It being conceded that all other legacies have been paid in full, and that whatever amount is found due from the executor is to be used to erect a children's home for Ashland county, it is ordered that within thirty days from this date, said executor pay over to the commissioners of Ashland county, said sum of \$17,386.23, with interest at 6 per cent from this date, to wit: July 20, 1909, and that George A. Ullman, personally pay all the costs in the hearing on the exceptions to this account and execution is awarded therefore.

Motion for new trial overruled. Judgment and decree to date from July 20, 1909.

ATTACHMENT—JUSTICE OF THE PEACE—PROCESS.

[Hamilton Common Pleas, July, 1908.]

NORTHERN PACIFIC RY. v. JACOB BAUM.

JURISDICTION OF J. P. IN ATTACHMENT AGAINST NONRESIDENT RAILWAY COMPANIES ACQUIRED BY LEVY ON GOODS AND PUBLICATION.

Under Secs. 6489 and 6496 Rev. Stat. authorizing issue of attachment against nonresident corporations and prescribing mode of service thereon, a justice of the peace obtains jurisdiction by publication and attachment of the goods of a foreign railway corporation, notwithstanding its president does not reside in, and its road does not enter, his township, and it cannot be served with process as required by Sec. 6478 Rev. Stat. in cases of actions against railway companies.

ERROR to justice of the peace.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.

J. B. Derbes and Victor Abraham, for defendant in error.

SWING, J.

The plaintiff in error, the Northern Pacific Railway Company, is a foreign corporation foreign to the state of Ohio, and has no railroad located in Ohio, and the president of the company does not reside in Ohio. The defendant, Jacob Baum, doing business as J. Baum Safe & Lock Co., at Cincinnati, Hamilton county, Ohio, commenced an action in 1907 before a justice of the peace in and for Cincinnati township, Hamilton county, Ohio, against the said the Northern Pacific railway, to recover the sum of \$24, and filed an affidavit in attachment. Summons was issued and an order of attachment, and the summons was served upon an alleged agent of the company, no other officer being found in Hamilton county, Ohio, and the order of attachment was levied

on certain properties of the said the Northern Pacific Railway Company found in said Cincinnati township.

A motion was made by the Northern Pacific Railway Company before the justice of the peace to set aside the service of summons and the levy in attachment, and upon hearing thereof the justice of the peace sustained the motion to set aside the service of summons, but overruled the motion to set aside the levy and attachment, holding that said railway company might be sued in an attachment proceeding, notice being given by publication as in other cases of nonresidents.

The railway company filed a petition in error in this court to reverse the judgment of the justice of the peace in overruling the motion to set aside the levy and attachment. It is claimed by the plaintiff in error that the justice of the peace had no jurisdiction in this case to entertain the action, even in attachment, against the Northern Pacific Railway Company, for the reason that under the law of Ohio suit cannot be brought against a railway company before a justice of the peace, whether it be a foreign or a domestic corporation, the president of which does not reside in the township or the road of which, whether owned or leased, does not go through the township. It is claimed that in this respect railway companies are in a different situation under our statutes from other corporations or persons.

Section 6478 Rev. Stat., as to actions before justices of the peace against railroad companies, is in part as follows:

"Suit may be brought before a justice of the peace against any railroad company, in the township in which the president of the company may reside, or in any township into or through which the road owned or leased by said company may be located, whether such company be foreign or created under the laws of this state, and whether the charter thereof prescribes the place where suits must be brought against it, or the manner or place of service or process thereon," etc.

The contention of the plaintiff in error is that Sec. 6478 is the only section of our statute which gives jurisdiction to justices of the peace to entertain an action, whether it be in attachment or not, against a railway company, whether foreign or domestic; and that the provisions of such sections as to service and summons are the only provisions of our law applicable to actions before justices of the peace against railway companies; and that there is no provision of our statutes giving to justices of the peace jurisdiction in an action against a foreign railway corporation which cannot be served with summons in pursuance of Sec. 6478 Rev. Stat. In support of their contentions they cite the case of *North v. Railway*, 10 Ohio St. 548. In that case it is said by the court:

"In an action brought against the railroad company before a justice of the peace the mode of service of summons upon the company.

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prescribed by the act of March 21, 1850, 'directing the manner of serving mesne process against railroad companies' 2 Curwen 1538 [see Sec. 6478 Rev. Stat.], is exclusive of any and all other modes.

"The mode for the service of summons upon corporations, in actions brought against them before a justice of the peace, prescribed in Sec. 15 of the act of March 14, 1853, 'of the jurisdiction and procedure before justices of the peace,' etc., 3 Curwen 2055 [see Sec. 6477 Rev. Stat.] is not applicable in suits against railroad companies."

This decision does clearly hold that the provisions of the statutes for the service of summons upon corporations generally, are not applicable to an action against a railway corporation before a justice of the peace. No question, however, involving the service in an attachment was raised or determined. But in the case of *Squire v. Railway*, 25 O. C. C. 30 (1 N. S. 354), it is held as follows:

"The jurisdiction of justices of the peace in actions against railway companies is defined and limited by Sec. 6478 Rev. Stat., which provides that such an action may be brought before a justice of the peace in the township in which the president of the company may reside or in any township into or through which the road owned or leased by such company may be located."

Section 584 Rev. Stat., which provides that where a summons issued by a justice of the peace against a leaseholder or freeholder resident of the county accompanied with an order to attach property the jurisdiction of which is coextensive with the county, does not include railway companies; hence a justice of the peace has no jurisdiction of the action against a railway company whose road does not enter the township and whose president is not a resident therein, although the summons in the action is accompanied by an order of attachment.

The court says in the report of the case, which is brief, page 31:

"The railroad company filed its petition in error in the court of common pleas to reverse said judgment (the judgment of the justice of the peace), on the ground that the justice of the peace had no jurisdiction over it, and in the petition in error, which was verified, set forth the facts, * * * that its line of railroad did not enter into Washington township; that it had no officer and no office there, and the judgment was reversed by the common pleas court."

The court further say, page 32:

"We are of opinion that the judgment of the court of common pleas was right, and it will be affirmed."

Here it is clearly held that a justice of the peace has no jurisdiction in any action against a railway company, whether in attachment or not, if the president of the company does not reside in the township, or if the road of the company does not enter into the township. If this be the law, the contention of the plaintiff in error in this case is correct.

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At the conclusion of the argument of this case and in considering the case for some time afterward, I was disposed to follow the decision of *Squire v. Railway, supra*, but upon further consideration I could not but doubt the correctness of that decision. While Sec. 6478 Rev. Stat. is as above set forth, in Sec. 6489, in the same chapter relating to the commencement of actions and process before justices of the peace, provision is made for attachments as follows:

Section 6489 Rev. Stat. "The plaintiff shall have an order of attachment against any property of the defendant (except as hereinafter provided) in a civil action before a justice of the peace, for the recovery of money, before or after the commencement thereof, when there is filed in this office an affidavit of the plaintiff, his agent or attorney, showing the nature of the plaintiff's claim, that it is just, the amount the affiant believes the plaintiff ought to recover," etc.

Also the existence of some one or more of the following particulars.

1. That the defendant, or one or several defendants, is a corporation having no officer upon whom a summons can be served, or place of doing business in the county, or is a nonresident of the county.

Section 6496 Rev. Stat., on the same subject, is as follows:

"If the order of attachment is made to accompany the summons, a copy thereof and the summons shall be served upon the defendant in the usual manner for the service of a summons, if the same can be done within the county; and when any property of the defendant has been taken under the order of attachment, and it shall appear that the summons issued in the action has not been, and cannot be served on the defendant in the county, in the manner prescribed by law, the justice of the peace shall continue the cause for a period not less than forty, nor more than sixty days; whereupon the plaintiff shall proceed for three consecutive weeks to publish in some newspaper printed in the county," etc.

— Upon careful consideration of these sections of our statutes I am not able to see why, in an attachment case, they, Secs. 6489 and 6496 Rev. Stat., should not apply as well in an action against a railway company coming within the provisions of Sec. 6478 as against any other corporations. To be sure, Sec. 6478 provides the particular manner in which service of process must be made in an action before a justice of the peace against a railway company and Sec. 6477 provides a different manner of service of summons against other corporations in an action before a justice of the peace; but both sections are followed by the attachment sections—6489 and 6496.

In *Champion Mach. Co. v. Huston*, 24 Ohio St. 503, it is said:

"A domestic corporation may be proceeded against by attachment before a justice of the peace, under Sec. 28 of the justice act, in a county

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of this state where it has no office or place of business, upon the ground that it is a nonresident of such county."

In *Southern Ohio Ry. v. Morey*, 47 Ohio St. 207 [24 N. E. Rep. 269; 7 L. R. A. 701], it is said in the syllabus:

"Section 5027, Revised Statutes, prescribing the counties within which a railroad company may be sued, relates solely to the jurisdiction of the person, and it is not necessary that the petition should state that its road passes into or through the county where the action is brought; a railroad company, like a natural person, submits itself to the jurisdiction of the court by appearing for any other purpose than to object to submit to such jurisdiction."

The court in the opinion, page 210, say:

"Section 5027 provides that: 'An action against * * * a railroad company, may be brought in any county through or into which road * * * passes.' This section, like the other sections of chapter five of the code of civil procedure, that merely prescribe the county in which a defendant may be sued, relate only to the jurisdiction over the person. Neither a railroad company nor other corporation, nor even a natural person, is bound to appear in an action in obedience to a summons served out of the prescribed county. It is a privilege, however, that is personal, and may be waived; and this court has uniformly held, that a defendant, by appearing in court, and, without objecting to its jurisdiction over his person, invoking any action in the cause, waives this privilege, and submits his person to the jurisdiction of the court."

Section 5027 is not a part of the justice of the peace act, but I think the principle is applicable to this case. I cannot think that Sec. 6478 Rev. Stat. can be construed to deprive a justice of the peace of jurisdiction over the subject-matter of an action against a foreign railway company whose president does not reside in the township or whose road does not enter the township; but as in *Southern Ohio Ry. v. Morey*, *supra*, the railroad company is not bound to appear in an action in obedience to a summons issued by a justice of the peace in a township in which the president does not reside or into which the road does not enter. I take it that if the company saw fit to enter its appearance it would give the justice jurisdiction.

Just so I am constrained to think that a justice will have jurisdiction under the attachment statutes where property of the company is located in the township and is attached, without having jurisdiction of the person or of the corporation in an action under Sec. 6478 Rev. Stat.

In the case of *Cartmell v. Wurlitzer Co.* 18 Dec. 380 (5 N. S. 604). it is said in the syllabus:

"Under Rev. Stat. 6489, which is amendatory of Sec. 28 of the justices' act (S. & C. 766), foreign corporations may be proceeded against before a justice of the peace the same as domestic corporations,

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but subject to a like statement in the affidavit that such corporation has no officer in the county upon whom summons may be served, or no place of doing business within the county."

This decision applies to foreign corporations other than railway corporations, but I am not able to see why the same thing may not be said as well of foreign railway corporations as of others. I am constrained, therefore, contrary to my first impression gathered from the decision of *Squire v. Railway, supra*, to hold that in an attachment case the justice of the peace has jurisdiction against a foreign railway company whose president does not reside in the township, and whose road does not enter the township, and which company cannot be served with process under Sec. 6478 Rev. Stat.

ABATEMENT—CORPORATIONS—PLEDGES.

[Montgomery Common Pleas, 1905.]

*HENRY M. SCHMUCK v. CRUME & SEFTON MFG. CO. ET AL.

1. DEFENDANT ALLEGING FACTS IN ANSWER CONSTITUTING PLEA IN ABATEMENT.

An answer setting forth facts which amount to a plea in abatement is entirely proper, where the pleadings are in such form that the defendant is compelled to himself allege the facts upon which the plea is based.

2. FACTS APPLIED.

In an action by a pledgee of corporate stock to compel the corporation to transfer the stock to him and alleging a wrongful conversion thereof, an answer which sets up a suit previously brought, based on precisely the same facts and involving the same evidence and the same measure of damages, is in the nature of a plea in abatement and affords ground for a dismissal of the petition.

3. RIGHTS OF PLEDGEE OF STOCK FAILING TO NOTIFY CORPORATION.

A corporation by a sale of its assets violates no rights of a holder of stock, assigned to him in blank and delivered to him as security, where the pledgee failed to give notice to the corporation that he was the holder of the stock until long after the sale had been effected.

Young & Young, for plaintiff.

Cottschall & Turner, for defendant:

Cited and commented upon the following authorities: *Sharpe v. Bank*, 87 Ala. 644 [7 So. Rep. 106]; *City & Suburban Ry. v. Brauss*, 70 Ga. 368; *Fordyce v. Nix*, 58 Ark. 136 [23 S. W. Rep. 967]; *Bradfield v. Hale*, 67 Ohio St. 316 [65 N. E. Rep. 1008]; *Kerr v. Lydecker*, 51 Ohio St. 240 [37 N. E. Rep. 267; 23 L. R. A. 842]; *Cleveland & M. Ry. v. Robbins*, 35 Ohio St. 483; *Seymour v. Railway*, 44 Ohio St. 12 [4 N. E. Rep. 236]; 28 Am. & Eng. Enc. Law (2 ed.)

*Affirmed by Supreme Court, without report, *Schmuck v. Manufacturing Co.* 78 Ohio St. 409.

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646, 651, 652; *Larrowe v. Beam*, 10 Ohio 498; *Horton v. Horner*, 14 Ohio 437; *Longworth v. Hunt*, 11 Ohio St. 194; *Lowell*, Transfer of Stock Chap. 5; *Paschall v. Hinderer*, 28 Ohio St. 568; *Larwill v. Burke*, 10 Circ. Dec. 605 (19 R. 513); *Cook*, Stock & Stockholders Secs. 192, 485, 534, 667; 2 *Thompson*, Corporations Secs. 2180, 2348, 2353, 2387; *Gibbons v. Mahon*, 136 U. S. 549 [10 Sup. Ct. Rep. 1057; 34 L. Ed. 525]; *Cincinnati, N. O. & T. P. Ry. v. Bank*, 56 Ohio St. 351 [47 N. E. Rep. 249; 43 L. R. A. 777]; *Ball v. Manufacturing Co.*, 67 Ohio St. 306 [65 N. E. Rep. 1015; 93 Am. St. Rep. 682]; *Clark & Marshall*, Corporations Secs. 560, 585; *Johnston v. Lafin*, 103 U. S. 800 [26 L. Ed. 532]; *Cleveland City Ry. v. Bank*, 68 Ohio St. 582 [67 N. E. Rep. 1075]; *Kearney Bank v. Froman*, 129 Mo. 427 [31 S. W. Rep. 769; 50 Am. St. Rep. 456]; *Casco Nat. Bank v. Clark*, 139 N. Y. 307 [34 N. E. Rep. 908; 36 Am. St. Rep. 705]; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414 [50 N. E. Rep. 1079; 64 Am. St. Rep. 125]; *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120 [36 S. W. Rep. 716; 35 L. R. A. 274; 56 Am. St. Rep. 788]; *Gemmell v. Davis*, 75 Md. 546 [23 Atl. Rep. 1032; 32 Am. St. Rep. 412]; *Beach*, Corporations Sec. 357; 5 *Thompson*, Corporations Sec. 6541; *Treadwell v. Manufacturing Co.* 73 Mass. (7 Gray) 393 [66 Am. Dec. 490]; *Holmes & Griggs Mfg. Co. v. Metal Co.* 127 N. Y. 252 [27 N. E. Rep. 831; 24 Am. St. Rep. 448]; *State v. Irrigating Canal Co.* 40 Kan. 96 [19 Pac. Rep. 349; 10 Am. St. Rep. 166]; *Freon v. Carriage Co.* 42 Ohio St. 30 [51 Am. Rep. 794]; *Henkle v. Manufacturing Co.* 39 Ohio St. 547; *Norton v. Norton*, 43 Ohio St. 509 [3 N. E. Rep. 348]; *Conant v. Reed*, 1 Ohio St. 298; *Franklin Bank v. Bank*, 36 Ohio St. 350 [38 Am. Rep. 594]; *Field*, Corporation 75; *Herrick v. Wardwell*, 58 Ohio St. 294 [50 N. E. Rep. 903]; *Stafford v. Banking Co.* 61 Ohio St. 160 [55 N. E. Rep. 162; 76 Am. St. Rep. 371]; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Gartner v. Corwine*, 57 Ohio St. 246 [48 N. E. Rep. 945]; *Sturges v. Burton*, 8 Ohio St. 215 [72 Am. Dec. 582]; *Ferguson v. Gilbert*, 16 Ohio St. 88; *Petersine v. Thomas*, 28 Ohio St. 596; *Covington & C. Bridge Co. v. Sargent*, 27 Ohio St. 233; *Cockley v. Brucker*, 54 Ohio St. 214 [44 N. E. Rep. 590]; *Cincinnati v. Emerson*, 57 Ohio St. 132 [48 N. E. Rep. 667]; *Swensen v. Cresop*, 28 Ohio St. 668; *Kunneke v. Mapel*, 60 Ohio St. 1 [53 N. E. Rep. 259]; *Mengert v. Brinkerhoff*, 67 Ohio St. 472 [66 N. E. Rep. 530]; *Watson v. Jones*, 80 U. S. (13 Wall.) 679 [20 L. Ed. 666]; *Foster v. Napier*, 73 Ala. 595; *Dick v. Gilmer*, 4 La. Ann. 520; *Weil v. Guerin*, 42 Ohio St. 299.

SNEDIKER, J.

The plaintiff in his petition in this case alleges that on May 20, A. D. 1892, George P. Huffman, a defendant (now deceased) borrowed from him the sum of \$7,500, giving to plaintiff his note in that amount,

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payable in one year after date, with 7 per cent interest from maturity, and at the same time and as collateral to secure the same a certain stock certificate of the Crume & Sefton Manufacturing Co., of Dayton, Ohio, in ordinary form, certifying that George P. Huffman is the owner of fifty shares of \$100 each of the Crume & Sefton Mfg. Co., of Dayton, Ohio; with the power and authority to sell and collect at Huffman's expense all or any part or portion thereof at any place, either in the city of Dayton or elsewhere, at public or private sale, at his option, on the nonperformance of the promise contained in the promissory note, and at any time thereafter, with advertising ten days in a Dayton daily paper, and with ten days' notice to Huffman, and in case of a public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

At the time of the delivery of said collateral the following transfer was signed in blank by Huffman:

“For value received I hereby sell, transfer and assign to Henry M. Schmuck fifty shares of the within stock and authorize _____ to make the necessary transfer on books of the company. Witness my hand and seal this twentieth day of May, A. D. 1900. George P. Huffman. (Seal.)”

Plaintiff further claims that at the time the code of regulations and by-laws of the defendant company contained a provision to the effect that the stock of said company shall be transferred only upon the books of the company in person or by attorney upon surrender of the previous certificate; that there was due, at the time of filing the petition, from the estate of the said George P. Huffman to the plaintiff the sum of \$5,335.31, with interest; that on or about September 1, 1893, while plaintiff so held said stock in pledge and in his own possession, the defendant company without his knowledge or consent and without notice to him made a sale of all of its assets, of its property and good will, to another corporation, to wit, the Carter-Crume Company, and in consideration thereof took and received from the Carter-Crume Company certain shares of the common and preferred stock of the said Carter-Crume Company; that a distribution or division of the stock was made to the stockholders of the Crume & Sefton Co., and that forty-six shares of common stock and one hundred and one shares of the preferred stock of the Carter-Crume Co. was distributed to said George P. Huffman.

Such distribution was made without surrender of the Huffman stock in the Crume & Sefton Co., and without transfer of the same, the original certificate of Huffman stock neither being demanded nor received by the said Crume & Sefton Co., but at the time being in possession of the plaintiff.

This the plaintiff claims was an unlawful appropriation and con-

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version to its own use by the Crume & Sefton Co. of the said stock of the Carter-Crume Co. and of the said stock of the Crume & Sefton Manufacturing Co.; that on June 11, 1898, the plaintiff presented his said collateral certificate of stock to the defendant company and to William M. Kinnard, who was then its secretary, and who was then and is still the custodian of its books and records, including this stock book, and whose duty it was under the laws and regulations of the company to make transfers of the stock whenever such transfers were requested, but said William M. Kinnard as such secretary and through him the defendant company unlawfully refused and still refuses to make such transfer of stock. Plaintiff says that by reason of the premises he has been damaged in the amount so owing in the said promissory note. Then follows the prayer of the petition. To this petition the defendant, the Crume & Sefton Mfg. Co., first files a special plea in the nature of a plea in abatement, which is as follows:

"Now comes the defendant, the Crume & Sefton Manufacturing Co., for the purpose of this special plea in the nature of a plea in abatement only, and for no other purpose, and for its special plea in the nature of a plea in abatement to the jurisdiction of this court of the subject-matter of this action, says that when this action was begun, and ever since, another action was, and still is, pending in this court between the same parties and for the same cause of action set forth in the petition in this action, being cause numbered 19,563 in this court, and entitled, 'Henry M. Schmuck, plaintiff, against the Crume & Sefton Manufacturing Company, and Charles J. McKee, as administrator of the estate of George P. Huffman, deceased, defendants,' and that the subject-matter of this action, and the relief sought, is identically the same as the subject-matter of the action and relief sought in the previous action brought, and which is still pending and undisposed of in this court, being said cause numbered 19,563 above referred to. Wherefore, this defendant, the Crume & Sefton Manufacturing Company, prays this cause be dismissed for want of jurisdiction of the subject of the action, and that it go hence with its costs."

There is also filed an amendment to the answer, but without taking that up at this time we will first consider the plea in abatement.

Plaintiff's counsel contend that there is no such thing as a plea in abatement in the state of Ohio. It is true there is no such a plea by name, but the court is not bound by the name given to a pleading by a party to a case, but may regard it as such pleading as it really is, and this, if not properly styled a plea in the nature of a plea in abatement, may be considered as an answer.

It is true that the code provides in the fourth subdivision of the causes of demurrer to a petition that a defendant may demur if there is another action pending between the same parties for the same cause,

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but a demurrer is only good when the defect is apparent upon the face of the pleading, and it would be a peculiar petition which would recite the matter in abatement to the effect that there is another action pending for the same cause. The plaintiff would hardly put in his complaint allegations which, showing these defects, must defeat him. To enable the defendant to reach those defects, he is, therefore, in such a case driven to allege himself the facts on which they arise. How can this be done in Ohio except by answer, as the defendant has done in this case? We regard the answer setting forth the plea in abatement, therefore, as entirely proper under the state of the pleadings before us.

From the allegations of the petition, what are the plaintiff's rights? Schmuck, being a pledgee of the stock, and, as appears from the testimony, no sale by him or transfer having been made on the books of the company of the same, or any demand therefor prior to the year 1898, the legal title to the stock was in Huffman. He (Huffman) was entitled to vote the stock and to receive dividends thereon and was the owner thereof and, so far as the petition or the evidence shows, his estate is still the owner, subject to the payment of the debt to the pledgee.

Schmuck had the option to perfect his security by having the same transferred to him upon the books of the company. This would have invested him with the legal title, but still as between him and Huffman the latter was the real owner until the power to sell had been exercised by Schmuck.

The blank form on the back of the certificate as admitted in the pleadings and the evidence was simply signed with the intention on the part of both parties to make the certificate available as security. It was intended by the parties as security merely and not as a transfer of the ownership in the stock. See *Norton v. Norton*, 43 Ohio St. 509 [3 N. E. Rep. 348].

A mere holding of the certificate under the circumstances alleged and proven does not vest in Schmuck the stock of the corporation represented by the certificate.

"There is a marked and obvious distinction between the stock of a corporation and the certificate representing such stock. The certificate of shares of stock in a corporation is not the stock itself, but is a mere evidence of the stockholder's interest in the corporate property of the corporation which issues said certificate." *Cook, Stock & Stockholders* Sec. 485.

"In the absence of statutory or charter requirements no certificate of stock is necessary to attest the rights of the shareholder in the corporation, and such certificate when issued to the owner of shares of stock is merely an evidence or acknowledgment of the owner's interest in the property of the corporation, but it is not the property itself. In law

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a corporation is the trustee of the corporate property and holds the same for the benefit of the stockholders." *Ball v. Manufacturing Co.* 67 Ohio St. 306, 314 [65 N. E. Rep. 1015; 93 Am. St. Rep. 682].

Nor does Schmuck become a stockholder by the mere holding of the stock certificate.

"It is pretty well settled that the assignees of stock certificates in a corporation by assignment from persons to whom the certificates were originally issued are not by virtue of such assignment shareholders when a transfer of shares is required to be made on the books of the company." *Field, Corporations* 75.

"The mere assignment gives the assignee an equitable title only, except as against the assignor. The certificates do not constitute property in the corporation; they are the muniments of title, but it is the shares of stock which constitute the property, and the persons whose names appear upon the books of the corporation are presumed to be the stockholders; they have the right to vote and participate in directing the policy of the company." *Wells v. Mill Co.* 1 Fed. Rep. 276, 277 [1 McCrary 62].

"It is to be observed that such a certificate is merely the paper representative of an incorporeal right, and that it stands on a similar footing to that of other muniments of title. It is not in itself property, but it is merely the symbol of paper evidence of property. Hence, the proprietary right may exist without the certificate. Numerous cases accordingly hold that a person may acquire the rights, and incur the liabilities of a shareholder, both to the corporation and to its creditors, although no certificate in fact has been issued." 2 *Thompson, Corporations* Sec. 2348.

"Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member."

"Sec. 2353. They are non-negotiable in the sense that a complete transfer of title, good not only between the parties but also against the corporation itself, can only be made with the concurrence of the act of the corporation in pursuance of its charter, governing statute, or operative by-laws."

"Whether shares of the stockholders, and the capital of the company, constitute the same, or different species of property, has been the subject of much discussion in a great number of cases. But the weight of authority we believe to be in favor of the proposition that shares of stock constitute property distinct from the capital or property of the company." *Lee v. Sturges*, 46 Ohio St. 153, 161 [19 N. E. Rep. 560; 2 L. R. A. 556].

"A person who holds shares of stock in pledge, although the shares

are assigned in blank by the registered owner, does not become a stockholder until the shares are transferred to him on the books of the corporation; and a mere pledgee, who has not become a registered stockholder, is not entitled to participate in, or to be notified of, the proceedings to effect a consolidation of two or more companies." *Cleveland City Ry. v. Bank*, 68 Ohio St. 582 [67 N. E. Rep. 1075].

In this case the Supreme Court also says, page 599:

"A person who holds shares of stock in pledge, assigned in blank by the registered owner, may protect himself by having the stock transferred to him on the books of the company. Until he does so he does not become a stockholder."

There is no provision for notice to, or requirement of, participation by a person who has a concealed equity in stock.

The rule as now declared in this state by Sec. 3259 Rev. Stat. is:

"The term 'stockholders,' as used in the preceding section, shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock although the stock appears on the books in the name of another."

"But neither under the general rule stated nor the rule thus fixed by statute, is one who holds the shares of stock *merely* as collateral security for a debt, without a transfer thereof to him on the books of the company, the legal or equitable owner of such stock. He would not be entitled to vote upon it as against his pledgor, and if he received any dividends the same would be credited upon the debt, as security for which he held it." *Henkle v. Manufacturing Co.* 39 Ohio St. 547, 553.

In *Willcocks, Ex parte*, 7 Cow. (N. Y.) 402, 411 [17 Am. Dec. 525], the court say:

"But we do not hesitate to say that, in a clear case of hypothecation, the pledgor may vote. The possession may well continue with him, consistently with the nature of the contract; and the stock remain in his name. Till enforced, and the title made absolute in the pledgee, and the name changed on the books, he should be received to vote. It is a question between him and the pledgee, with which the corporation have nothing to do."

"It is also a general rule that an equitable assignment of shares of stock does not effect a novation of membership, nor place the assignee in privity with the other shareholders, until a formal transfer has been executed. Until a transfer out of his name, the stockholder of record is to the world the owner of the stock and the assignee must abide by his action in the management of corporate affairs." *Elyea v. Mining Co.* 169 N. Y. 29 [61 N. E. Rep. 992].

Having neither the legal nor the equitable title to the Huffman stock, the certificate not being the stock, and Schmuck not a stockholder,

the evidence showing that there has never been a transfer on the books of the Crume & Sefton Mfg. Co. of said stock, or an issue of any new stock therefor, as in *Cleveland & M. Ry. v. Robbins*, 35 Ohio St. 483, and therefore there being no violation of the provision that the same is only transferable on the books of the company, we are inclined to the opinion, in consideration of the foregoing authorities, that no act of the company in 1893 could be said to have deprived Schmuck of his property or to be unauthorized as to him, he not having any authority in the premises. And the "act of conversion is the distinct unauthorized and positive assumption of the powers of the true owner."

In other words, it means "detaining goods so as to deprive the person entitled to the possession of them of his dominion over them," and it is difficult to see what dominion Schmuck had over the property of this company in 1893.

This seems to be contradictory to the decision of our circuit court in the former case, but since that decision we have the reported case of *Cleveland City Ry. v. Bank*, *supra*, and this being of the Supreme Court is paramount and must be favored.

The effect of the rule laid down in that case is that Schmuck in 1893 was entitled to no notice—had no right to participate, was entirely without authority in the premises, and must abide by the action of the corporation in the sale of its assets to the Carter-Crume Company.

The claim of counsel for the plaintiff—that the decision, *Cleveland City Ry. v. Bank*, is of a case arising under a special statute, and that a corporation had no right at common law to make such a sale as was made in this case of its entire assets, and to take therefor and distribute among its stockholders the stock of another company to which it had sold, or with which it had combined—we find to be not well founded.

In the case of *Treadwell v. Manufacturing Co.* 73 Mass. (7 Gray) 393 [66 Am. Dec. 490], we find an identical case.

The syllabus in that case is as follows:

"The directors of a manufacturing corporation, as the best means of continuing the business, and pursuant to the votes of a majority of the stockholders, though against the protest of a minority, may sell the whole property of the corporation to a new corporation, taking payment in shares of the new corporation, to be distributed among those of the old stockholders who are willing to take them."

On page 404 the court say:

"But we entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not

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limited as to objects, circumstances or quantity." Angell & Ames, Corporations Sec. 127 *et seq.*; 2 Kent's Commentaries (6 ed.) 280; *Colchester (Mayor) v. Lowton*, 1 Ves. & Bea. 226, 240, 244; *Binney's Case*, 2 Bland (Md.) 99, 142.

Also, see, *Holmes & Griggs Mfg. Co. v. Metal Co.* 127 N. Y. 252, 259 [27 N. E. Rep. 831; 24 Am. St. Rep. 448].

In Angell, Corporations Sec. 187, the author says:

"Corporations aggregate have at common law an incidental right to alien or dispose of their lands and chattels unless specially restrained by their charters or by statute."

"Section 193. In general, corporations must take and convey their lands and other property, in the same manner as individuals; the laws relating to the transfer of property being equally applicable to both."

And in *Dana v. Bank*, 5 Watts & Serg. 223, 243, the court say:

"According to the principles of common law, every corporation has, by being duly created, tacitly annexed to it, without any express provision, the same power and capacity of suing and being sued, impleading and being impleaded, granting and receiving by its corporate name, and of doing all other acts, that a natural person has. And this power or capacity has been said to be necessarily and inseparably annexed to it (1 Kyd, Corporations 69). But that it has, at least, every capacity that is necessary to carry into effect the purposes for which it was established, can not well be questioned. It is also capable, by the general rule of the common law, of taking any grant of property, privileges and franchises in the same manner as a private person. And this capacity extends alike to real and personal property. In regard, however, to real estate, restraints are frequently imposed by statute, though not often as to personal. So corporations, unless expressly restrained by the act which establishes them or some other act, have and always have had an unlimited power over their respective properties, and may alienate and dispose of the same as fully as an individual may do in respect to his own property."

In *Burton's Appeal*, 57 Pa. St. 213, we find at page 218:

"The right of alienation is an incident of ownership and belongs to a corporation as well as to an individual, when no restraint is imposed in the charter. *Dana v. Bank*, 5 Watts & Serg. 243; *Sutton's Hospital*, 10 Coke R. 23, 30; Angell & Ames, Corporation 188; *Walker v. Vincent*, [19 Pa. St.] 7 Harris 369."

"This right is not restrained by any state policy. On the contrary, free and unrestrained commerce in property, real and personal, has always been regarded as a favorite doctrine."

In *Binney's Case*, *supra*, the court say, page 141:

"In this instance, the object is to control this company in the disbursement of its corporate funds, on the ground, that they are not ap-

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plied to corporate purposes, or in the manner authorized by the act of incorporation. It is said, that according to the civil law, the rights of bodies politic over their corporate property is alike that of minors; and that they cannot be permitted to dispose of it in any way to the prejudice of the institution. But, according to the common law, it is otherwise; for it is laid down as an incident of all bodies politic, that corporate property may be encumbered, applied, or aliened, by its full and regular assent, in any manner, and for any purpose whatever; the will of the artificial body, as of a natural body, in all cases, being the law, and standing in the place of any reason for so doing."

The evidence in this case shows that the date of this note was May 20, 1892; that the collateral security was signed in blank and delivered to Schmuck to secure the note at the same time as the note; that the first notice by Schmuck's own testimony, claimed to have been given to the Crume & Sefton Company that Schmuck held the stock as collateral, was three or four years after the date of the note; that the sale of the assets of the Crume & Sefton Company to the Carter-Crume Company, occurred about September 1, 1893, so that such sale was made at least two or three years before the company had received any notice of any kind or character from Schmuck (giving him the benefit of his own claim), as to his being in possession of this certificate.

Under the authorities cited, how did this company violate any right of Schmuck in the sale of its corporate assets or in its combination with the Carter-Crume Company?

His rights not having been violated by such sale, how does a cause of action accrue to him therefor? The violation of a legal right constitutes a cause of action. It is not alone the wrong but the right and the wrong together which constitute the cause of action, so that the only cause of action stated in the petition and supported by the evidence in the case at bar is that wherein Schmuck claims that there was a refusal on the part of the company to transfer the stock to him on its books—that is, a conversion, if it occurred; and for that he would be entitled to recover damages. But this same cause of action is sued on in case No. 19,563 referred to in the plea in abatement. The petition in that case, so far as it goes, is identical with the petition in this case, irrespective of the claim of conversion in 1893.

Finding that the only cause of action shown by the pleadings and the evidence in this case is that of the refusal to transfer the stock on the books of the company, the same evidence would support the petition in case No. 19,563 as would be required to support the cause of action in this case. The same measure of damages would be applicable in both cases, and the recovery in case No. 19,563 would operate as a bar to a recovery in this case, so that we regard the plea in abatement, or more properly the answer which sets forth the facts as to the pendency of

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case No. 19,563 as well founded, and this being our view of the case, the action should be and is accordingly abated, and the petition herein is dismissed at the costs of the plaintiff.

WILLS.

[Hamilton Common Pleas, July, 1908.]

F. H. TAYLOR ET AL., EXRS. V. EDWARD TAYLOR ET AL.

1. ADMISSIBILITY OF EXTRINSIC EVIDENCE OF BLOOD RELATIONSHIP OF DEVISEES IN CONSTRUING WILL.

The rule that extrinsic evidence is admissible in aid of the construction of a will, permits of the introduction of evidence as to the blood relationship existing between the devisees, and also of a previous will after which the one in hand was copied.

2. RULE APPLIED TO FACTS.

An estate was devised in equal parts to A, B, C, D, E, F, G, heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*, G, H, and I. *Held*, It having been shown that E, F, and G are heirs of Rebecca H. Taylor, the phrase "heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*" must be construed as constituting a separate bequest, and not to be descriptive of E, F, and G, who each take a separate share of the estate and also a share jointly.

R. DeV. Carroll and Maxwell & Ramsey, for plaintiffs.
Kittredge & Wilby, for defendants.

SWING, J.

The plaintiffs, Frank H. Taylor and Frank H. Simpson, as executors of the last will and testament of Laura C. Taylor, deceased, pray for a construction of the will of the said Laura C. Taylor.

The particular clause of the will which seems to require construction is clause 1, as follows, to wit:

"My late husband, Henry W. Taylor, bequeathed me an estate appraised, at the time of his death, at two hundred and seventy-six thousand dollars (\$276,000) more or less. If at the time of my decease there has been no shrinkage or loss in any of my investments which have been made since his death, or which may hereafter be made, or in the value of any piece or pieces of my real estate, then I give and bequeath two-thirds of the sum of two hundred and seventy-six thousand dollars, or so much thereof as may remain after deducting the amounts hereinafter provided for, to be divided equally among the following relatives of my late husband, viz: Edward Taylor, of Illinois; Edward T. Dugdale, George H. Dugdale, Emma E. Dugdale, Esther E. McGregor, Edward B. Taylor, Anna H. Williams, Howard G. Taylor, the heirs of the body of Rebecca H. Taylor per stirpes and

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not *per capita*, Joseph E. Taylor, Anne M. Taylor, Julia K. Taylor, Alice Marsh, daughter of Joseph E. Taylor; and if any of the said legatees shall have previously died leaving issue, then, in that event, the parent's share is to be equally divided among his or her surviving children. If, however, shrinkages have taken place in the value of any of my securities, investments, or properties, then the total amount to be divided, as above set forth, shall be reduced by two-thirds of the amount of such shrinkages. I also direct that the amount to be divided, as above set forth, shall be reduced by the entire amount of the taxes, and of the cost of administering my estate. I hereby authorize my executors, at their option, to pay the bequests above named, to the said above named legatees, either in money, or in securities, stocks, or bonds which may belong to me at the time of my death; or by transferring to them, either separately or as tenants in common, real estate which I may own at my death; and if said bequests are paid in securities, stocks, bonds, or real estate, their value, in such payment, shall be the value placed upon them by the appraisers of my estate. *The above bequests are made with the knowledge of my children, and in accordance with my husband's desire that a portion of my estate should be so divided."*

The particular words in said clause of said will about which the plaintiffs say they are in doubt and of which they ask construction are the words, "the heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*."

It is claimed by certain of the parties in interest that by the said words the children of Rebecca H. Taylor took a share of the estate *per stirpes*; that said words constitute one of the particular and distinct devises of the said will and proof has been offered to show who are "the heirs of the body of Rebecca H. Taylor."

It is shown by the proof that they are the three persons named in said clause immediately before the said words of which construction is sought, to wit: Edward B. Taylor, Anna H. Williams, Howard G. Taylor. This could only be shown by extrinsic proof. It could not be gathered from the will alone.

It is claimed that by the said clause of said will a share of the estate is devised to Edward Taylor, of Illinois; a share to Edward T. Dugdale; a share to George H. Dugdale; a share to Emma E. Dugdale; a share to Esther E. McGregor; a share to Howard G. Taylor, and also another share to the said Edward B. Taylor, Anna H. Williams and Howard G. Taylor as "*the heirs of the body of Rebecca H. Taylor per stirpes*," thus giving to the said Edward B. Taylor, Anna H. Williams and Howard G. Taylor are the "heirs of the body of Rebecca H. Taylor," and with certain ones named after them, and in addition thereto a share to all three of them *per stirpes*.

It is claimed by other parties in interest that the words, "the heirs

of the body of Rebecca H. Taylor *per stirpes* and not *per capita*," are to be read as part of the one devise to Edward B. Taylor, Anna H. Williams and Howard G. Taylor described by said words as being "the heirs of the body of Rebecca H. Taylor" who are to take *per stirpes* and not *per capita*.

Reading clause 1 of the will without any evidence outside the will to throw light upon it, it would seem to be probably or almost certainly, the true construction that the provision that the "heirs of the body of Rebecca H. Taylor" are to take a share *per stirpes* and not *per capita*, is in itself a separate bequest to such heirs; but doubt is thrown upon the meaning by the proof that *Edward B. Taylor, Anna H. Williams* and *Howard G. Taylor* are the "heirs of the body of Rebecca H. Taylor," and without further explanation by evidence outside the will that fact would seem to be in some degree in favor of the contention that the words "the heirs of the body of Rebecca H. Taylor" are simply words descriptive of the persons designated as Edward B. Taylor, Anna H. Williams and Howard G. Taylor; though not, I think, conclusive, reading the whole of clause 1. But there are other facts shown by the evidence outside the will itself which throw further light upon the question and the meaning of the will.

Clause 1 of the will itself shows that the testatrix received the estate devised by will from her deceased husband, Henry W. Taylor. Clause 1 commences with the words, "My late husband, Henry W. Taylor, bequeathed me an estate," etc. The last sentence in clause 1 also refers to the will of her deceased husband by the words, "The above bequests are made with the knowledge of my children, and in accordance with my husband's desire that a portion of my estate should be so divided."

The evidence outside the will itself, taken together with the recitals in the will, goes to show that the will was drawn after, in a manner in accordance with, the provisions of the will of the said Henry W. Taylor, deceased, and the will of Henry W. Taylor, deceased, has been offered in evidence, though objected to as incompetent, as throwing light upon the intention of the testatrix, Laura C. Taylor, in her will. Beginning with item 2, the will of the said Henry W. Taylor makes bequests to the said persons named in clause 1 of the will of Laura C. Taylor, deceased, and in the order in which they are there named in the said will of Laura C. Taylor, beginning in item 2 with the words, "I give and bequeath to my nephew, Edward Taylor of Illinois"; item 3, "I give and bequeath to my nephew, Edward T. Dugdale"; and so on through the list to item 9 inclusive, the said item 9 beginning with the words, "I give and bequeath to my nephew, Howard G. Taylor," etc.

The said Henry W. Taylor having in his will by items 7, 8 and 9

made bequests to Edward B. Taylor, Anna H. Williams and Howard G. Taylor respectively, proceeds by item 10 with a bequest to the said Rebecca H. Taylor in the words following: "10. I give and bequeath to my sister-in-law, Rebecca H. Taylor, or her heirs," and so forth. Then, following the bequest to Rebecca H. Taylor, he makes bequests by succeeding items of his will to Joseph E. Taylor and Anne M. Taylor, Julia K. Taylor and to Alice Marsh in the same order as in the will of Laura C. Taylor, deceased.

It is quite apparent that the will of Laura C. Taylor was written by the testatrix with the will of Henry W. Taylor before her and that she followed it, making her bequests in the same order as those in the will of the said Henry W. Taylor, deceased; but Rebecca H. Taylor being dead at the time of the execution of the will of Laura C. Taylor, she made a bequest to the "heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*," instead of a bequest to the said Rebecca H. Taylor herself. It is clear to me that when she made the bequest to the "heirs of the body of Rebecca H. Taylor," following the bequests to the persons who are those heirs in their order as they are in the will of Henry W. Taylor, she had item 10 of that will before her and purposely made the bequest to the "heirs of the body of Rebecca H. Taylor" in the place, as to order, of the bequest in the will of Henry W. Taylor to the said Rebecca H. Taylor, and that she did not use the words "the heirs of the body of Rebecca H. Taylor" as descriptive of the persons named before, Edward B. Taylor, Anna H. Williams and Howard G. Taylor, who were the heirs of the body of Rebecca H. Taylor.

I cannot but conclude that she intended by her will to give Edward B. Taylor a share, Anna H. Williams a share, Howard G. Taylor a share *per capita*, and the three together, as "the heirs of the body of Rebecca H. Taylor," a share *per stirpes* and not *per capita*.

The evidence shows that the will of Laura C. Taylor, deceased, is in her own handwriting, but the technical legal expressions used in the words "the heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*," indicate that some lawyer had taken the will of Henry W. Taylor at her request and written the will for her following the provisions of the will of Henry W. Taylor and that she had re-written it in her own hand and executed it, for I can hardly think that she could have used the words "heirs of the body" and "*per stirpes*" and "*per capita*" as they are used. Nor can I think that she intended the words "*per stirpes* and not *per capita*," to modify the bequests to the said three by name.

But the will as it is written is her will and I cannot think that the person who wrote it for her substituted for "Rebecca H. Taylor or her heirs," of item 10 of the will of Henry W. Taylor, the words "the heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*" with

the understanding that they were merely descriptive of the persons previously named, who were in fact the heirs of her body, nor can I think that Laura C. Taylor in writing the will herself used those words as descriptive merely.

That this is the true construction of the will, although it gives to Edward B. Taylor, Anna H. Williams and Howard G. Taylor each one share and, in addition, to the three, a share *per stirpes*, is rendered the more probable by another curious fact shown by the will and the evidence outside the will and about which there is no dispute in the case; for following the bequest to the "heirs of the body of Rebecca H. Taylor, deceased," there is a bequest to "Joseph E. Taylor, Anna M. Taylor, Julia K. Taylor, Alice Marsh, daughter of Joseph E. Taylor."

The evidence shows that Anne M. Taylor, Julia K. Taylor and Alice Marsh are, all of them, children of the said Joseph E. Taylor. The will by the words quoted gives to the said Joseph E. Taylor a share, and to each of his said three children a share, and then adds, "if any of the said legatees shall have previously died leaving issue, then, in that event, the parent's share is to be equally divided among his or her surviving children."

The evidence shows that before the death of the testatrix, Laura C. Taylor, but after the execution of her will, the said Joseph E. Taylor died; and by the terms of her will just quoted the children of the said Joseph E. Taylor surviving him, to wit: the said Anne M. Taylor, Julia K. Taylor and Alice Marsh take each a share of the estate of said Laura C. Taylor, and in addition thereto have the share that was devised by the will to the said Joseph E. Taylor, so that there are two instances in this clause 1 of the will of Laura C. Taylor in which persons named take twice, about one of the instances there being no dispute.

This last instance also occurs from the following by the testatrix of the will of the said Henry W. Taylor.

All this seems to me to be fairly clear, reading the will of Laura C. Taylor together with the will of Henry W. Taylor.

But it was strenuously contended in argument of the case that the will of Henry W. Taylor was not competent evidence to explain the will of Laura C. Taylor, to enable the court to ascertain the meaning of the said Laura C. Taylor.

As bearing upon this question I quote the following. In 2 Redfield, Wills 496, Chap. 10, under the title "Extrinsic Evidence in Aid of Construction," it is said:

"The rules for the admission and exclusion of parol evidence in regard to wills are essentially the same which prevail in regard to contracts generally.

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"It cannot be received to show the intention of the testator except by enabling the court where the question arises to give his language such an interpretation as it is reasonable to presume from the circumstances in which he was placed he intended it should receive; or to put the court in the place of the testator."

In same volume, page 501, speaking of the admission of evidence for the correction of mistakes apparent on the face of wills, *but also upon construction of wills in case of ambiguity*, it is said:

"This question is very extensively discussed by Chancellor Kent in the earlier cases carefully revised. That experienced and careful judge thus expresses the rule of law: 'It is a well settled rule of law that seems not to stand in need of much proof or illustration for it runs through all the books from Cheney's case (5 Co. Rep. 68) down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of the will nor to explain the intention of the testator except in two specified cases; 1, *where there is a latent ambiguity arising de hors the will as to the person or subject-matter meant to be described.*' "

In 2 Redfield, Wills 621, it is said:

"*The courts do not commonly reject any evidence which in any fair view may be presumed to have a bearing upon the construction of the will, and it is not uncommon for the courts to call for the original draught of a will, or a former will, from which the will in question was made, and inspect them for the purpose of seeing precisely how the mistake did occur.*"

At another place on the same page, 621, it is said:

"The only advantage which in such cases can be derived from extrinsic evidence is to enable the court to *place themselves in the precise position of the testator with his knowledge of extraneous facts and circumstances* so as to enable them to give such a construction to the words as the testator himself would have done; *i. e.*, such as will carry out his intention in using them as far as they can be clearly gathered from the words of the will."

The author after saying that "it is not uncommon for the courts to call for the original draught of a will or a former will from which the will in question was made to inspect them," etc., makes curious and interesting comment as follows:

"This was done by Lord Brougham, Chancellor, in the important case of *Langston v. Langston*, and his Lordship while deciding precisely in accordance with the light thus obtained disclaimed all aid from this source and declared the testimony inadmissible, but where evidence is confessedly inadmissible it would seem more consistent and more dignified as well as modest in the court as a general rule certainly not to examine it."

The author adds a note on the same page with the quotation from *Langston v. Langston*, 2 Cl. & Fin. 240, to which I make reference without quoting.

Reference is made by the author in a note, on page 623, also to *Blundell v. Gladstone*, 11 Sim. 467, 468, which case it is said "was heard on appeal before the chancellor and two common law judges and affirmed. 1 Phillips 279."

In the report, *Blundell v. Gladstone*, 1 Phillips 279, it is said on page 283: "It appears that the testator had made two former wills, one in the year 1821, the other in the year 1827." A statement is then made of the contents of those two wills as bearing upon the question in the case of *Blundell v. Gladstone*, which was a case of uncertainty as to who was intended as the devisee named in the will. It is said on page 284:

"From both these wills it is collected that the testator knew the name of Mr. Thomas Weld's next brother to be Joseph, and, from the will of 1827, that having selected the second son of Mr. Joseph Weld (the present plaintiff) as the object of his devise, he knew how to describe him," etc.

See, also, pages 287-288 and other pages.

These statements are from the opinion of the judge below and the Lord Chancellor in deciding the case upon the appeal said, page 289:

"We are much obliged to the learned judges for their assistance on this occasion, and for the attention they have paid to this question. I entirely concur in the opinion which they have so clearly and so fully expressed;" proceeding to state the case.

It is said in 1 Redfield, Wills 573, under "Latent Ambiguities and the Mode of their Removal":

"The greatest scope for the admission of parol evidence in explanation of the intention of the testator arises in regard to what are denominated latent ambiguities. These are so called since they are not apparent upon the face of the will *but arise from the proof of facts outside the will showing that the words of the instrument although apparently definite and specific in themselves are nevertheless susceptible of an application with equal propriety to two or more different subjects or objects.*"

The ambiguity in the will of Laura C. Taylor arises from the proof that the three persons previously named are "the heirs of the body of Rebecca H. Taylor."

On page 581 is an interesting note upon a doubt expressed by Blackburn, J., in the case of the will of Joseph Grant, as to the competency of certain extrinsic evidence. And in the note it is said:

"We are certainly not able to comprehend the ground of his hesitation," etc. "It must rest upon some doubt or hesitation in re-

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gard to the fact whether the case is strictly one of latent ambiguity or only one of defective description to be aided in its construction by placing the court in the position of the testator, at the time he made his will, both as to his property and the person whom he intended to benefit. For if it were clearly a case of the former character" (latent ambiguity) "there could be no question upon the weight of existing authority in the English courts, that *all the evidence offered was admissible*. But the case seems to us clearly one of latent ambiguity although not strictly one of equivocation, *but no doubt in either view the proof of the surrounding circumstances was admissible*."

It is stated in 1 Jarman, Wills (6 ed.) 443, that, "*Evidence of all the material facts in the case is admissible to assist in the exposition of the will*."

It is stated in 1 Jarman, Wills star pages 391, 392, 393, *that extrinsic evidence is admissible to prove or repel double portion*.

On page 392, it is said:

"Such evidence may also be adduced to repel the presumption as distinguished from an express declaration against double portions."

It is said also on the same page:

"In all these cases parol evidence is admissible to repel the presumption; counter evidence is also admissible in support of it."

Now in the will of Laura C. Taylor, clause 1, there is clearly stated a bequest to "the heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*."

As the basis of any claim that these words are descriptive of persons previously named, extrinsic evidence is necessary because it is admitted that not all persons previously named are heirs of the body of Rebecca H. Taylor; and it is shown by extrinsic evidence, and could not be ascertained in any other way, that only three of the persons previously named answer that description, to wit, Edward B. Taylor, Anna H. Williams and Howard G. Taylor. But the fact that these three are in fact heirs of the body of Rebecca H. Taylor is not necessarily conclusive of the claim that the words "the heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*," are simply descriptive of these three; and I think "counter evidence" must be admissible to show the real intention.

I am inclined to think upon consideration that reading the will just as it is, except with the knowledge that the three are the heirs of the body of Rebecca H. Taylor, the words "the heirs of the body of Rebecca H. Taylor" should not be held to be descriptive, but to constitute a separate bequest.

But evidence having been offered to show that the three persons named are the heirs of the body of Rebecca H. Taylor, it would seem to be competent that any other evidence of circumstances existing at

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the time of the execution of the will "which in any fair view may be presumed to have a bearing upon the construction of the will," may also be considered, and I cannot but think that the will of the deceased husband of the testatrix from whom she received the estate and to which will reference is made by her in clause 1 of her will, she reciting that she made her bequests in accordance with her said husband's desire that a portion of her estate should be so devised and with the knowledge of her children, is competent.

Leaving the will of Henry W. Taylor out of consideration, I would still be inclined to think in view of the whole of clause 1 of the will of Laura C. Taylor that the words, "the heirs of the body of Rebecca H. Taylor *per stirpes* and not *per capita*," constitute a separate devise to such heirs in addition to the individual bequests to them immediately preceding the said words, but taking into consideration the will of Henry W. Taylor it would seem quite certain that such is the proper construction.

ACTIONS—COUNTIES—LIMITATION OF ACTIONS.

[Hamilton Common Pleas, January 6, 1909.]

STATE EX REL. HIRAM M. RULISON, PROS. ATTY., v. JOHN KILGOUR.

1. ACTION TO RECOVER INTEREST ON UNAUTHORIZED COUNTY DEPOSITS BROUGHT BY PROSECUTOR.

A county prosecuting attorney has authority to maintain an action against banks for recovery of interest on unauthorized deposits made by the county treasurer from public funds in his hands.

2. LIMITATION OF ACTIONS APPLICABLE.

The six-year statute of limitations applies to an action to recover interest on unauthorized deposits of county funds, but the four-year statute and the one-year statute do not apply.

3. BAR OF PREVIOUS RECOVERY.

The defense that certain judgments have been fully satisfied, which were obtained against former treasurers on account of interest on such deposits received by them as a personal gratuity, is a bar to the prosecution of actions against the banks for recovery of further sums alleged to be due the county on account of interest on such deposits.

The amended petition filed in the common pleas court in this case was as follows:

Relator represents to the court that Hiram M. Rulison is the duly elected and legally qualified prosecuting attorney for Hamilton county, Ohio, and that he brings this action against John Kilgour, doing a banking business under the name of the Franklin Bank, by virtue of the power and authority vested in him by Sec. 1277 Rev. Stat.

Plaintiff says that at numerous times between the twenty-fourth

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day of December, A. D. 1895, and the twenty-first day of October, A. D. 1903, the defendant without warrant of law obtained possession, custody and control of public moneys of Hamilton county, Ohio, from and with the consent of the several county treasurers of said Hamilton county, Ohio, during said period, knowing that said moneys were public moneys of said county; that the defendant without warrant of law withheld said public moneys from the county treasury of said county during the period aforesaid; that said obtaining possession, custody and control and withholding of the public money aforesaid was secretly, fraudulently and illegally done by the defendant, without the knowledge of plaintiff, or of the board of county commissioners of said Hamilton county, Ohio, or of any county officers of said county, other than the several county treasurers of said Hamilton county, Ohio, during said period. Plaintiff says that he makes no claim in this action that said public moneys have not been returned to the county treasurer.

Plaintiff is unable to state the various amounts of said public moneys so obtained and withheld as aforesaid by said defendant; and plaintiff is unable to state either the exact dates when defendant obtained possession of said public moneys as aforesaid, or the exact periods of time during which defendant so withheld said public moneys as aforesaid, or whether or not all of the public moneys were in the county treasury on the various settlement days during the period before mentioned.

Plaintiff further says that the defendant secretly, fraudulently and illegally, and without the knowledge of plaintiff or of the board of county commissioners of said Hamilton county, Ohio, or any county officers of said county other than the several treasurers of said Hamilton county, Ohio, during said period, commingled the said public moneys with other moneys then in its possession, and used the same as a part of its moneys in its banking business; and that defendant during the period aforesaid has obtained thereby large profits and increments on the said commingled moneys as aforesaid; and that the plaintiff is unable to state the amount of said profits and increments.

Plaintiff further says that there is due from the defendant to the said county of Hamilton, interest at the rate of 6 per centum per annum on each and all of said public moneys of said county of which defendant obtained possession, and which defendant withheld as aforesaid during the various times said defendant, after obtaining possession, custody and control as aforesaid, withheld said public moneys of said county as aforesaid; and that there is due the said county of Hamilton in addition thereto from the defendant any and all profits and increments obtained as aforesaid in excess of 6 per centum due as aforesaid on each and all of said public moneys so obtained and withheld as aforesaid.

Plaintiff says that the account of the interest, profits and increments due the said county of Hamilton as aforesaid involves a complicated and intricate state of accounts between plaintiff and defendant, and that it is impossible for plaintiff and defendant to agree or adjust said accounts of said interest and profits and increments due said county of Hamilton as aforesaid.

Wherefore, plaintiff prays that the defendant may be ordered to make an account touching the items of increments, profits and interest thus received, and that the court may order the reference of said accounts to a master for the purpose of determining the same and ascertaining the exact amount due the county of Hamilton; that after an account has been so had between said parties, that a judgment may be entered in favor of the plaintiff herein against the defendant for the use of the said county of Hamilton, for the amount of said interest, profits and increments so found due the said county of Hamilton, and that plaintiff may have all other just and proper relief at law and in equity in the premises.

H. M. Rulison, Pros. Atty., **F. Morris** and **C. O. Rose**, Asst. Pros. Attys., for plaintiff: .

Cited and commented upon the following authorities: *State v. Zumstein*, 2 Circ. Dec. 539 (4 R. 268); *State v. Banks*, 16 Dec. 730 (4 N. S. 245); *State v. Copeland*, 96 Tenn. 296 [34 S. W. Rep. 427; 31 L. R. A. 844; 54 Am. St. Rep. 840]; *Eshelby v. Cincinnati (Bd. of Ed.)*, 66 Ohio St. 71 [63 N. E. Rep. 586]; *Glenville (Vil.) v. Englehart*, 10 Circ. Dec. 408 (19 R. 285); *Conkling v. Coonrod*, 6 Ohio St. 611; *State v. Foster*, 5 Wyo. 199 [38 Pac. Rep. 926; 29 L. R. A. 226; 63 Am. St. Rep. 47]; *McClure v. LaPlata Co. (Comrs.)* 19 Colo. 122 [34 Pac. Rep. 763]; *Throop v. Langdon*, 40 Mich. 673; *Dillon*, Munic. Corp. 740; *Wasteney v. Schott*, 58 Ohio St. 410 [51 N. E. Rep. 34]; *Seeley v. Thomas*, 31 Ohio St. 301; *Hartman v. Hunter*, 56 Ohio St. 175 [46 N. E. Rep. 577]; *Greene Tp. (Tr.) v. Campbell*, 16 Ohio St. 11; *Wood v. Ferguson*, 7 Ohio St. 288; *State v. Tin & Japan Co.* 66 Ohio St. 182 [64 N. E. Rep. 68]; *State v. Griftner*, 61 Ohio St. 201 [55 N. E. Rep. 612]; *State v. Railway*, 53 Ohio St. 189 [41 N. E. Rep. 205]; *State v. Board of Pub. Wks.* 36 Ohio St. 409; *Monroe v. Doe*, 7 Ohio (pt. 2) 262; *Wallace v. Miner*, 6 Ohio 366; *Ohio State University (Tr.) v. Satterfield*, 1 Circ. Dec. 377 (2 R. 86); *State v. Abbot*, 25 Circ. Dec. 538 (2 N. S. 281); *Cincinnati v. Church*, 8 Ohio 298 [82 Am. Dec. 718]; *State v. Railway*, 2 Dec. 300 (1 N. P. 292); *Hays v. Park Co.* 13 Dec. 67; *Ormsby v. Longworth*, 11 Ohio St. 653; *Long v. Mulford*, 17 Ohio St. 484 [93 Am. Dec. 638]; *Combs v. Watson*, 32 Ohio St. 228; *Carpenter v. Canal Co.* 35 Ohio St. 307; *Railway v. Smith*, 48 Ohio St. 219 [31 N. E. Rep. 743]; *State v. Oil Co.* 49

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Ohio St. 137 [30 N. E. Rep. 279; 15 L. R. A. 145; 34 Am. St. Rep. 541]; *Zieverink v. Kemper*, 50 Ohio St. 208 [34 N. E. Rep. 250]; *Stivens v. Summers*, 68 Ohio St. 421 [67 N. E. Rep. 884]; *Sayler v. Simpson*, 12 Dec. 148; *Williams v. Presbyterian Soc.* 1 Ohio St. 478; *Longworth v. Hunt*, 11 Ohio St. 194; *Howk v. Minnick*, 19 Ohio St. 462 [2 Am. Rep. 413]; *Loffland v. Bush*, 26 Ohio St. 559; *Piatt v. Longworth*, 27 Ohio St. 159; *Maple v. Railway*, 40 Ohio St. 313 [48 Am. Rep. 685]; *Western Reserve Bank v. McIntire*, 40 Ohio St. 528; *Boies v. Johnson*, 15 Circ. Dec. 331 (1 N. S. 451); *Duhme v. Mehner*, 5 Dec. 107 (3 N. P. 266); *Bohm Bros. & Co. v. Cunningham*, 7 Dec. Re. 382 (2 Bull. 274); *Stephenson v. Reeder*, 7 Dec. 411 (2 Bull. 335); *Williams v. Presbyterian Soc.* 1 Ohio St. 478; *Phillips v. State*, 5 Ohio St. 122 [64 Am. Dec. 635]; *Michoud v. Girod*, 45 U. S. (4 How. 503) 1076; *Boone v. Chiles*, 35 U. S. (10 Pet. 177) 388; 17 Ves. 88; *Angell*, Lim. of Act. Sec. 468; *Perry*, Trusts Sec. 865, 867; *Paschall v. Hinderer*, 28 Ohio St. 568; *Jones v. Jones*, 10 Circ. Dec. 71 (18 R. 260); *Central Trust Co. v. Burke*, 2 Dec. 96 (1 N. P. 169); *Bettman v. Hunt*, 9 Dec. Re. 396 (12 Bull. 286); *Gary v. May*, 16 Ohio 66; *Williams v. Van Tuyl*, 2 Ohio St. 336; *Ormsby v. Longworth*, 11 Ohio St. 653; *Fisher v. Mossman*, 11 Ohio St. 42; *Carlisle v. Foster*, 10 Ohio St. 198; *Mack v. Brammer*, 28 Ohio St. 508; *Yearly v. Long*, 40 Ohio St. 27; *Douglas v. Corry*, 46 Ohio St. 349 [21 N. E. Rep. 440; 15 Am. St. Rep. 604]; *Gray v. Kerr*, 46 Ohio St. 652 [23 N. E. Rep. 136]; *Webster v. Bible Society*, 50 Ohio St. 1 [33 N. E. Rep. 297]; *Townsend v. Eichelberger*, 51 Ohio St. 213 [38 N. E. Rep. 207]; *Lease v. Downey*, 3 Circ. Dec. 235 (5 R. 480); *Irwin v. Lloyd*, 11 Circ. Dec. 212 (20 R. 339); *Fuller v. Railway*, 11 Dec. 574 (8 N. P. 605); *Chapman v. Loveland*, 11 Ohio St. 214; *Howard v. Gunnison*, 12 Dec. 684; *Rawson v. Knight*, 71 Me. 99; *Stephen*, Pleading 51; *Hurst v. Everett*, 21 Fed. Rep. 218; *Kinkead*, Code Pl. (2 ed.) 75; *Bates*, Pleading 352; 10 Ohio Enc. Dig. Rep. 1037.

Kittredge & Wilby, Maxwell & Ramsey, Paxton & Warrington and Peck, Schaffer & Peck, for defendants:

Cited and commented upon the following authorities: *Vindicator Ptg. Co. v. State*, 68 Ohio St. 362 [67 N. E. Rep. 733]; *Lawrence Ry. v. Mahoning Co. (Comrs.)* 35 Ohio St. 1; *State v. Zumstein*, 2 Circ. Dec. 539 (4 R. 268); *Wasteney v. Schott*, 58 Ohio St. 410 [51 N. E. Rep. 34]; *Mayor v. Lever*, 1 Q. B. 168; *Skyles*, Agency Sec. 553; *Glaspie v. Keator*, 56 Fed. Rep. 203; *Herman*, Estoppel 96, 1062; 24 Enc. Law 307; *Bliss*, Code Plead. 68:

SWING, J.

This case is submitted to me upon a demurrer of the plaintiff to the second, third, fourth, fifth and sixth defenses in the answer of

the defendant to the amended petition of the plaintiff, the ground of the demurrer to each of said defenses being that it does not state facts sufficient in law to constitute a defense.

The second defense is that the prosecuting attorney of Hamilton county, Ohio, is not authorized by law and has no legal capacity to bring or maintain the action. I am of the opinion that the demurrer to this defense is well taken and should be sustained. If there is a cause of action stated, I think the prosecuting attorney is the proper person to bring it as he has done.

The third defense is that the action was not brought within six years after the cause of action accrued—a plea of the statute of limitations. The court of common pleas of Allen county, Ohio, Mathers, J., in a similar case, *State v. Bank*, 19 Dec. 82 (7 N. S. 43), has held that the six-year limitation applies. I have read the opinion of the court in that case with care and have further investigated the question, and my conclusion is that the six-year limitation does apply. In view of all the authorities upon the question which I have examined, I cannot be quite sure that there is any limitation. If the amended petition had set forth that the state of Ohio has a substantial interest I would be inclined to the opinion that there is no limitation, but this action purports to be for the benefit of Hamilton county, and there is no allegation in the amended petition that the state of Ohio has an interest in the action, and unless I should take judicial notice of the fact, if it be a fact, the action would seem to be, as alleged in the amended petition, for the benefit of the county only.

Not without some misgiving, I will overrule the demurrer to the third defense.

The fourth and fifth defenses are also pleas of the statute of limitation—one the four-year limitation, the other the one-year limitation; to these two defenses the demurrer is sustained.

The sixth defense pleads certain judgments formerly rendered against several former treasurers of Hamilton county, Ohio, which judgments, alleged to have been fully satisfied, are pleaded as a bar to this action. Reading the allegations in the amended petition and the allegations in the sixth defense in the answer together, I am of the opinion that the demurrer to the sixth defense should be overruled. I am of the opinion that if the plaintiff has any right of action against the defendant such as is claimed in this case, the plea in bar to it is well taken. It is also contended in argument that under the law there is no right of action in the plaintiff in such case as this. This contention, I am of opinion, is sound. But be that as it may, the demurrer to the sixth defense will therefore be overruled.

I have given the most careful attention to the question of law raised in this case and cannot but think that the conclusions I have

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reached as to the sixth defense are capable of being demonstrated as correct with almost, if not quite, mathematical certainty; but as the discussion of the reasons and numerous authorities on the subject which have been cited to me by counsel in oral argument and learned briefs, and which authorities, together with others which I have carefully examined, would necessarily be voluminous, I content myself with stating the conclusions which I have reached. There are numerous other cases involving the same questions here decided, which were submitted to me upon demurrers, together with the demurrer in this case, and the conclusions above stated will apply to all the cases submitted.

ATTACHMENT AND GARNISHMENT.

[Hamilton Common Pleas, March, 1909.]

GEORGE B. RILEY v. ATLANTIC COAST LINE CO.**CONTINUANCE OF MAIN ACTION AMOUNTING TO DISCONTINUANCE DEFEATS ATTACHMENT.**

An attachment proceeding, being ancillary to the main action, necessarily fails by the dismissal or illegal continuance of such action; to effect the release of the property so seized and held subject to the order of court, a motion to discharge the attachment properly lies.

[Syllabus approved by the court.]

Kinkead, Rogers & Ellis, for the motion.**M. G. Heintz**, contra.**HUNT, J.**

An attachment proceeding is a statutory proceeding ancillary to certain classes of civil actions. It is considered independently of the main action, except in so far as the character of the main action is involved in the necessary averments in the affidavit in attachment. The validity of the attachment proceeding does not depend on whether or not the defendant in the main action has or has not been brought into court so long as he can be brought into court in such main action. If the main action is dismissed for any cause, or discontinued by reason of the failure of the plaintiff to do things which are required to be done in order to require the defendant to respond to the bill of particulars as filed at or before the issuing of the attachment, the ancillary attachment proceeding, dependent by its nature upon the existence of the action itself, must fail.

In this case, the continuance of the action without the consent of the defendant in a manner not authorized by statute, operated as a

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discontinuance of the action. The attachment proceeding, being merely ancillary thereto, was necessarily discontinued at the same time.

If no property had been actually seized under the attachment, the attachment might have been ignored as no longer of any effect, but as property had been taken under the attachment proceeding, the only way to have it released was to file a motion to discharge the attachment, and such motion, under the circumstances of this cause, should have been granted by the justice.

EXTRADITION.

[Hamilton Common Pleas, August 8, 1908.]

LEMUEL F. CRAIG, IN RE.

EXTRADITION PAPERS VOID WHEN SIGNED IN BLANK.

When a warrant of extradition is signed by the governor in blank and is afterward filled out by his secretary writing therein the name of some accused person, it is a nullity; but the governor may issue a valid warrant on the same paper.

Scott Bonham, for petitioner.

J. H. Russe, Pros. Atty. for Dearborn county, Indiana, *contra*.

SWING, J.

This matter comes before me upon what purports to be an extradition warrant by the governor of this state and upon writ of habeas corpus.

Demand was made upon the governor of Ohio by the governor of Indiana for the arrest of Lemuel F. Craig and that he be delivered to the Indiana authorities upon a charge made against him in that state of false pretenses, etc., and a warrant purporting to be an extradition warrant signed and issued by the governor of this state is presented to me.

Lemuel F. Craig was arrested upon the said warrant of extradition and brought before me as a judge of the common pleas court, according to the statute in such case, and made application for a writ of habeas corpus, alleging that he was unlawfully detained and setting forth various grounds for his claim.

I have heard the matter of the extradition and the habeas corpus upon the evidence and the arguments of counsel.

Without going into all the questions raised, I find and hold that the various contentions of counsel for Lemuel F. Craig are not well taken except as to the validity of the warrant of extradition.

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It was shown in the evidence by a deposition of a secretary in the office of the governor of this state, and is not controverted, that the governor signed certain warrants of extradition in blank, and that in his absence application was made for a warrant of extradition for Lemuel F. Craig, and that a warrant so signed by the governor in blank was filled in by secretary in his office with the name of Lemuel F. Craig and the other statements necessary for the filling of the blanks, and that the governor himself did not grant and issue the warrant of extradition.

It is claimed by counsel for Craig that the said warrant of extradition is invalid.

I need not set forth the provisions of the constitution of the United States and of the state of Ohio as to extradition.

The statute of Ohio on that subject enacted in accordance with the provisions of the constitutions of the United States and of the state of Ohio, Sec. 59 Rev. Stat., provides as follows:

"The governor, in any case authorized by the constitution of the United States, may, on demand, deliver over to the executive authority of any other state or territory, any person charged therein with treason, felony, or other crime committed therein," etc.

It is further provided by said section that:

"Such demand or application [for the delivery of the person] must be accompanied by sworn evidence that the party charged is a fugitive from justice, and that the demand or application is made in good faith for the punishment of crime, and not for the purpose of collecting a debt of pecuniary mulct, or of removing the alleged fugitive to a foreign jurisdiction with a view there to serve him with civil process; and also by a duly attested copy of an indictment or an information, or a duly attested copy of a complaint made before a court or magistrate authorized to take the same, such complaint to be accompanied by an affidavit or affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof; the same shall also be accompanied by a statement in writing from the prosecuting attorney of the proper county, who shall briefly set forth all the facts of the case, the reputation of the party or parties asking such requisition, and whether, in his opinion, such requisition is sought from improper motives, or in good faith to enforce the criminal laws of Ohio, and such further evidence in support thereof as the governor may require."

Section 96 Rev. Stat. provides as follows:

"When such demand or application is made, the attorney-general, or the prosecuting attorney of any county, shall, if the governor requires it, forthwith investigate the grounds thereof, and report to the governor all the material facts which may come to his knowledge, with

an abstract of the evidence in the case," etc., "with an opinion as to the legality and necessity of complying with the demand or application."

In Sec. 97 Rev. Stat. it is provided that, "if the governor decides that it is proper to comply with the demand, he shall issue a warrant," etc., and it is provided that the accused shall be brought before a judge of the Supreme Court or of a circuit court or a common pleas court for examination upon the charge.

The provisions of the statute would seem clearly upon the face of them to impose upon the governor personally the power and duty of granting and issuing extradition warrants.

Authority is not wanting upon the subject. In the year 1892 Judge Moses F. Wilson, then a judge of the court of common pleas of Hamilton county, in the Going extradition case held that:

"A warrant which had been signed by the governor in blank, and which was afterwards, in his absence, filled out by his secretary, was invalid."

See editorial on this decision, in 28 Bull. 133.

The editorial in *Weekly Law Bulletin* further says:

"The question was involved in the case of *Larney, Ex parte*, and decided by the Supreme Court December 6, 1881 (see 6 Bull. 759, 797). That case was decided without report, but several lawyers of Cincinnati who were interested in the case, wrote to the court, asking on what grounds the court had decided the case. Judge Okey, the then chief justice of the Supreme Court, in his answer, stated the points of the decision as follows:

"1. 'When the governor signs a warrant for extradition in blank, it is a nullity, and he may issue a valid warrant on the same paper.'"

And then in the letter follow other points that were decided.

In 38 Bull. 85, there is another and interesting editorial on the subject to which attention has been called by counsel, reviewing the record in *Larney, Ex parte*, and reaching the conclusion that the question of the validity of an extradition warrant signed in blank by the governor and filled out afterward by a secretary in the governor's absence was not really involved in that case.

The record as published, may, if not carefully read, indicate that the question was not necessarily involved, but it does recite that Judge F. W. Moore had held "the warrant to be invalid upon information deemed reliable that it was issued when the governor was not present at his office," and that Larney had been ordered to be rearrested, etc., and he was rearrested upon a second warrant.

But whether the question was necessarily involved in the Larney case or not, it is quite clear that Judge Okey in his letter in relation to the case understood that it was, and that the question had been de-

eided, and understood the law to be as he states, that "when the governor signs a warrant for extradition in blank, it is a nullity."

It may be further said, however, that the question did arise as shown by *Larney, Ex parte*, in this way, to wit, the record shows that one of the grounds of attack upon the second arrest under another extradition warrant was "as to the regularity of the proceedings."

I have no doubt that the question arose as to whether the second arrest under a second warrant of extradition, the first having been held invalid because signed by the governor in blank, was regular. The court held that it was regular, and it is in that connection, I have no doubt, that Judge Okey wrote, "When the governor signs a warrant for extradition in blank, it is a nullity, and he may issue a valid warrant on the same paper."

It appears clear, therefore, that the question was before the Supreme Court and was passed upon, and I cannot assume, as the editor in the article in 38 Bull. 85 seems to assume, that Judge Okey did not correctly understand what was involved in *Larney, Ex parte*, and what was decided and what the law was when he wrote the letter quoted. In 28 Bull. 133.

In the case of *Work v. Corrington*, 34 Ohio St. 64 [32 Am. Rep. 345], Judge Okey, writing the opinion, sets forth very fully the grounds upon which it would seem that the law must be held to be that a warrant for extradition signed by the governor in blank is invalid.

In that opinion, in which all the judges of our Supreme Court concur, the nature of the power and duty of the governor in such a case is ably discussed. The question in that case was as to the power of the governor to revoke an extradition warrant issued by his predecessor in office, but the discussion as to powers and duties of the governor in extradition matters is very instructive. It is said, quoting from *Kentucky v. Dennison*, 65 U. S. (24 How.) 66 [16 L. Ed. 717]: "In such cases the governor acts in his official character, and represents the sovereignty of the state." It is also said, quoting from *Taylor v. Taintor*, 83 U. S. (16 Wall.) 366 [21 L. Ed. 287], that the governor "is vested with discretion to withhold the warrant," and a number of instances are mentioned and discussed, and it is said on page 75:

"The duty of the governor, in cases of that class [referring to a certain class of cases], is, therefore, one of great delicacy."

In the opinion it is repeatedly stated that the governor has it in his power and it is often his duty to exercise "his discretion."

In the case of *Tod, In re*, 12 S. D. 386 [81 N. W. Rep. 637; 47 L. R. A. 566; 76 Am. St. Rep. 616], it is said in the syllabus:

"The duty of examining extradition papers, passing on their validity and issuing his warrant devolves upon the governor personally, and the power cannot be delegated."

It is said in the opinion, page 396, "it was also shown on the hearing that the warrant purporting to be signed by the executive of this state was never in fact issued by him, but was issued by some person other than the governor. The duty of examining requisition papers, passing upon their validity, and issuing his warrant devolves upon the governor personally. It is a power that cannot be delegated to any other person. The liberty of the citizen is involved, and he can only be restrained of that liberty by the personal act of the governor upon whom the power has been conferred by the constitution and laws of the United States, and the constitution and laws of this state. The execution of the power requires careful examination of the requisition papers, and involves the exercise of a sound judgment, aided, in case of necessity, by the advice of the attorney-general of the state. The liberty of the citizen would be in great danger if any person could be allowed to issue such extradition warrants in the absence of the governor."

Other authorities bearing directly and indirectly upon the question might be cited but it would seem to be unnecessary.

I am reluctant to discharge the prisoner in this case. In holding the warrant invalid I do not mean the slightest criticism upon any practice that may prevail in the governor's office, and which may be a wise practice in general. The validity of a governor's warrant is not often questioned on the ground raised in this case for the reason that, as held by Judge Okey, a new warrant can be readily obtained. Whatever practice may prevail is doubtless quite reasonable under all the circumstances that exist, but when the question of the validity of a warrant signed in blank by the governor and filled in by a secretary in his absence, is clearly raised before me and the facts are shown conclusively, I can only decide according to what I understand to be the law in such case.

APPEAL—BANKRUPTCY.

[Hamilton Common Pleas, December, 1908.]

CHARLES B. WILBY v. JOSEPH H. MONTER.

BANKRUPTCY DISCHARGE OF JUDGMENT DEBTOR DOES NOT RELEASE SURETY ON APPEAL.

A discharge in bankruptcy does not extinguish the debt but only the right to recover upon it; therefore, securing a discharge in bankruptcy by a judgment debtor pending an appeal to an adverse judgment against him does not release his surety on the appeal bond.

[Syllabus approved by the court.]

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Mitchell Wilby, for plaintiff.

W. B. Mente, for defendant.

WOODMANSEE, J.

On March 28, 1906, plaintiff recovered a judgment against the defendant, Joseph H. Monter, before a justice of the peace in this county, in the sum of \$200. On April 6, 1906, Harry C. Hohman signed an appeal bond in terms as follows:

"I, Harry C. Hohman, do hereby promise and undertake in the sum of \$425 that said appellant shall duly prosecute appeal to effect without unnecessary delay, and if judgment be awarded against said appellant, that I will satisfy said judgment with interest and costs that may accrue."

In due time a transcript for appeal was filed in this court and on May 4, plaintiff filed his petition asking judgment on the original claim.

On November 14, 1906, the defendant filed his petition in bankruptcy setting out that plaintiff's claim was his only liability, and it would seem therefore that the petition was filed for the purpose of getting rid of said obligation.

Defendant secured his discharge in bankruptcy on February 25, 1907; thereupon by leave of court he filed his supplementary answer herein, setting up his discharge in bankruptcy, and filed a certified copy of his discharge.

Plaintiff thereupon filed a reply, setting out the appeal bond in terms as quoted above, and prayed for judgment against the defendant in this action with the condition that execution should be perpetually stayed thereon.

To this a demurrer was filed by the defendant, and as there is no dispute about the facts set up in the various pleadings, the whole case can be determined upon the demurrer to the reply.

It must be conceded that the discharge in bankruptcy does not extinguish the debt but only the right to recover upon it.

It is not questioned that in the case of a debt that existed at the time of entering the proceedings in bankruptcy that any other person jointly liable or liable as a surety on the debt would not be released by the discharge, and therefore it has been held that a judgment could be taken against all parties that were liable including the principal, but in his case he would be entitled to a perpetual stay of execution.

The point involved in this case is as to whether or not the liability of a bondsman can be canceled by the principal securing the release. This court is of the opinion that it cannot.

I quote from Justice Gray in *Hill v. Harding*, 130 U. S. 699, 703 [9 Sup. Ct. Rep. 725; 32 L. Ed. 1083, 1084].

The bankruptcy act does not "prevent that court from rendering

judgment on the verdict against him, with a perpetual stay of execution, so as to * * * leave them at liberty to proceed against the sureties.

"There is nothing in the bankrupt act to prevent rendering of such a judgment. * * * The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties, in accordance with the express terms of their contract, and with the spirit of the provision of the bankrupt act which declares that 'no discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.'"

In the case of *Farrell v. Finch*, 40 Ohio St. 377, it seems that Farrell had signed an appeal bond for one Clarkson, who, during the pendency of the case in the common pleas court, obtained a discharge in bankruptcy.

The opinion in that case does not show whether a judgment was obtained in the common pleas court against Clarkson, before the discharge, but it holds as follows:

"That while the discharge of Clarkson suspended all remedy against him for the collection of his debts, it did not release Farrell from liability on the undertaking for appeal."

See also, *Hill v. Harding*, 116 Ill. 92 [4 N. E. Rep. 361].

The demurrer to plaintiff's reply will be overruled.

FORCIBLE ENTRY AND DETAINER.

[Hamilton Common Pleas, 1909.]

EDWARD ELLISON V. SETH C. FOSTER ET AL.

1. MOTION TO VACATE INJUNCTION RESTRAINING EXECUTION OF JUDGMENT FOR RESTRICTION OF PREMISES DEPENDS ON JURISDICTION OF JUSTICE OF THE PEACE.

The availability of a motion to vacate a temporary restraining order enjoining execution of a judgment by a justice of the peace for restitution of demised premises to the owner of the fee, depends solely on the question whether the justice had jurisdiction to render such a judgment.

2. JUSTICE CANNOT DETERMINE TITLE IN FORCIBLE ENTRY AND DETAINER.

A justice of the peace is without jurisdiction in forcible entry and detainer, where it is necessary to draw the title to the property in question in order to determine whether the tenant is holding over, or holds unlawfully and forcibly.

3. FAILURE TO DEMAND EXACT RENT DUE AT EXPIRATION OF TERM WAIVES FORFEITURE.

A lease for three and one-half years renewable forever is a perpetual lease, and where the lessor permits the lessee to remain in possession of the premises after the expiration of the term, without making a proper

demand for the exact amount of rent due and on the day when due, the right of forfeiture for rent unpaid and past due is waived, notwithstanding a covenant for re-entry.

Galvin & Bauer, for plaintiff.

J. L. Stettinius, for defendant:

Cited and commented upon the following authorities. 24 Cyc. 1007; 18 Am. & Eng. Enc. Law 694; *Kollock v. Scribner*, 98 Wis. 104 [73 N. W. Rep. 776]; *Bateman v. Murray*, 5 Bro. P. C. 20; *Brennen v. Cist*, 9 Dec. 18 (6 N. P. 1); *Katsampos v. Hull*, 17 Dec. 747 (5 O. L. R. 140); *Hamilton v. Adams*, 15 Ala. 596 [50 Am. Dec. 150]; *Dedman v. Smith*, 9 Ky. (2 Marsh. A. K.) 260.

GORMAN, J.

Plaintiff, Edward Ellison, brought this action against Seth C. Foster, Julia R. Foster, his wife, John L. Stettinius, Ben Tebbe, constable, and M. Muller, justice of the peace, alleging in his petition that he is the owner and in possession of a certain leasehold estate, situated in Clifton, Cincinnati, Ohio, on the west side of Biddle street and fronting thereon 100 feet by a depth of 250 feet. That said lease was duly executed by defendants, Seth C. Foster and Julia R. Foster, his wife, on June 26, 1905, and duly recorded in the lease records of Hamilton county, Ohio; that said lease is for a term of three and one-half years from June 12, 1905, and to be fully completed and ended on December 11, 1908, and renewable forever on said December 11, 1908, upon an annual rental of \$240, payable in equal quarterly installments of \$60 on the twelfth days of March, June, September and December: that said lease contained a privilege of purchase for \$4,000 at any time during the term of the lease or of any renewal thereof in favor of plaintiff, his heirs or assigns, and that the lessee (plaintiff) and his assigns may make payment on account of the purchase money in sums of not less than \$500 at the time of paying any quarterly ground rent.

The lease is attached to the petition and made a part thereof, and a reference thereto supports all the said averments of the petition. The lease contains the usual and ordinary covenants of a perpetual lease, and the only differences appear to be that the term is fixed at three and one-half years, renewable forever, instead of ninety-nine years, renewable forever. There is also a statement at the end before the testatum clause that "It is understood that this lease takes the place of, and is executed instead of, that between the same parties, dated November 16, 1898." The lessee covenants to pay all taxes, assessments and charges, etc., that may be levied on the premises at any time during the demise, including the taxes and assessments which were a lien at the date of the execution of the lease. There is also a

covenant of re-entry for failure to pay rent for thirty days after demand made personally or on the premises, which demand may be made on the day of payment or at any time thereafter.

Plaintiff further avers that he has a perpetual lease with privilege of purchase at \$4,000; that he has paid his obligations thereunder in manner, form and method recognized and permitted by said Foster for many years; that by a long course of dealing with defendant, Foster, he was accustomed to pay his rent long after it was due under the lease; that in October, 1908, he paid on account of his rent, and the same was received by said Foster, \$240, and no demand made upon plaintiff for the arrearages of rent, and no intimation to him from Foster that he was required to pay up all arrearages; that no demand of any character was ever made upon plaintiff for the payment of the arrearages of rent as provided in the lease; that the premises are worth much more than \$4,000, the purchase price; that he has paid all taxes to date.

Plaintiff further avers that prior to the bringing of this action said Foster, through John L. Stettinius, his attorney and agent, commenced a suit in forcible entry and detainer against him, and that the said suit was duly prosecuted by giving notice as the law requires, filing a complaint and serving him in due form as provided by statute, and that on January 12, 1909, a judgment was entered against plaintiff in said forcible entry and detainer case, and a writ of restitution issued for the recovery of the possession of said premises, and placed in the hands of defendant, Ben Tebbe, constable, for execution; that unless restrained by this court said constable will, in the execution of said writ, forcibly dispossess plaintiff of said premises, and that for said injury he has no adequate remedy at law.

Plaintiff further avers that on January 12, 1909, judgment was entered against him by said defendant, M. Muller, justice of the peace, in favor of defendant, Seth C. Foster, for \$300, the amount of rent unpaid under said lease up to December 12, 1908.

Plaintiff further avers that said proceedings in forcible entry and detainer are illegal and void; that said justice of the peace had no jurisdiction to render a judgment against plaintiff for restitution of said premises and that by reason of the judgment in favor of said Foster for said rent and the failure to demand payment in accordance with the terms and covenants of the said lease, said Foster has exhausted his remedy against plaintiff and cannot enforce a forfeiture.

A temporary restraining order was issued by this court on January 22, 1909, against all the defendants, except M. Muller, justice of the peace, upon plaintiff giving bond in the sum of \$250, and the matter is now submitted to the court on the motion of defendants to vacate said temporary restraining order.

The merits of the motion have been ably argued *pro* and *con* by

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counsel for plaintiff and defendants, and well considered briefs have been filed for the information and assistance of the court.

Counsel for defendants has urged upon the court three reasons why the temporary restraining order should be vacated if it be conceded that the justice of the peace had jurisdiction in the forcible entry and detainer case. But this would be begging the question, for, if the justice of the peace had jurisdiction of the person of plaintiff and the subject-matter, then there is no doubt that the temporary restraining order must be dissolved. If the justice had jurisdiction to render the judgment in the forcible entry and detainer case, then no injunction would lie to restrain the execution of the judgment, however many errors might have been committed in the trial before him. The remedy in such a case would be by error to this court. If the temporary restraining order was rightfully issued in the first instance, or can be rightfully continued now, it must be because the justice of the peace had no jurisdiction to enter the judgment of restitution in favor of defendant, Foster. And it will be observed that plaintiff grounds this action on the claim that the justice had no jurisdiction in the premises, and that therefore the whole proceedings before him, including the judgment, are null and void.

Plaintiff contends that the title to the premises covered by this lease is drawn in question, and that, therefore, the justice had no jurisdiction to hear and determine the cause, even where the plaintiff was served and failed to appear.

This proposition is well settled, not only in this state, but in others having a summary provision for obtaining possession of real estate similar to our statutory provisions of forcible entry and detainer, that the justice has no jurisdiction in forcible entry and detainer where it is necessary to draw the title to the real estate in question in order to determine whether or not the tenant is holding over or unlawfully and forcibly holds. *Bridwell v. Bancroft*, 2 Dec. Re. 697 (4 W. L. M. 617); *Aubrey v. Almy*, 4 Ohio St. 525; *Jones, Landlord & Ten.* 636, Sec. 563; *Hoffman v. Clark*, 63 Mich. 175 [29 N. W. Rep. 695].

In a forcible entry and detainer case the right of possession only is involved and title is not within the issue involved. This form of proceeding is possessory only and therefore will not lie against one who has entered under a lease, valid for one year, and holds under a contract enforceable in equity against the plaintiff as a lease for a longer period. *Lobdell v. Mason*, 71 Miss. 937 [15 So. Rep. 44].

Plaintiff further claims that the right of renewal contained in the lease gave plaintiff the option at the end of any term to have a renewal thereof forever. The term was for three and one-half years, renewable forever. But this claim appears to the court to be merely another

Ellison v. Foster.

form of stating that the title to the property sought to be recovered in the forcible entry and detainer case was drawn in question, and therefore the justice of the peace had no jurisdiction.

The real question therefore in the case at bar is whether or not the title to the property described in the petition was involved in the forcible entry and detainer case before Justice Muller, and if it was necessarily involved and the justice was required to pass upon the question of the title in order to determine what judgment should have been rendered, then he was without jurisdiction to proceed and the judgment is null and void, and the writ of restitution in the hands of the constable cannot be used to dispossess the plaintiff.

The determination of this question involves an inquiry into the character and extent of the lessee's rights under the lease.

I am of the opinion that this lease is perpetual.

The term to be forever renewed is three and one-half years, instead of the usual term of ninety-nine years. There is no magic in numbers, even though they be a succession of nines. Any other term of years than ninety-nine, renewable forever, would constitute a perpetuity. Indeed a demise to A B, his heirs and assigns, for such a term of time as he pays rent, he covenanting for himself and his heirs to pay rent and perform covenants, is a perpetual lease; so a lease "as long as water runs, or grass grows" is good as a perpetual lease. Taylor, Landl. & Ten. (9 ed.) 97, Sec. 74; *Folts v. Huntley*, 7 Wend. (N. Y.) 210; *Van Rensselaer v. Hays*, 19 N. Y. 68 [75 Am. Dec. 278]; *White v. Fuller*, 38 Vt. 193.

It will be noticed in the case at bar that the lease runs to Edward Ellison, his heirs, executors and administrators and assigns; they are the grantees. The words are as broad as those employed in conveyance of the fee simple; and there is a grant, lease and demise. The lessee, his heirs, executors, administrators and assigns covenant to pay rent, taxes, assessments and charges. The lessor, for himself, his heirs, executors, administrators and assigns covenant with the lessee, and the wife of the lessor joins in the lease and agrees to release dower in case of an exercise of the privilege of purchase.

What words of perpetuity, binding the parties, their heirs, administrators, executors and assigns are omitted from this demise that are used in a conveyance of the fee simple title which conveys the greatest interest one can have in real estate?

It must, therefore, be manifest that this lease is a perpetuity or a permanent leasehold estate, as defined by our statutes, and subject to all the burdens and entitled to all the respect and reverence that attach to fee simple estates.

By the provisions of Sec. 2733 Rev. Stat., such leases as the one at bar are considered for the purposes of taxation as the property of

the person holding the lease and shall be assessed in their name, and by Sec. 5374 Rev. Stat. the leasehold may be taken on execution.

By the express terms of Sec. 4181 Rev. Stat. permanent leasehold estates, renewable forever, shall be subject to the same law of descent as estates in fee simple are subject to by the provisions relating to descent and distribution of real property. Title 4, Chap. 2.

As far back as 1842 the Supreme Court in the case of *Loring v. Melendy*, 11 Ohio 355, declared that a permanent leasehold estate is not a chattel, but is realty, subject to all the laws and rules which attach to the land for all purposes. On page 358 the court says, that "A permanent leasehold estate is not a chattel, but is, in truth, land carrying the fee."

This broad doctrine of the nature and character of the estate of a permanent leasehold estate is confirmed and approved by the following cases: *Laird v. Cincinnati*, 8 Dec. Re. 140 (5 Bull. 903); *Northern Bank of Ky. v. Roosa*, 13 Ohio 335; *St. Bernard v. Kemper*, 60 Ohio St. 244 [54 N. E. Rep. 267; 45 L. R. A. 662].

But it is urged by counsel for defendants that the provision in the lease for a renewal is merely a covenant to give a new lease and requires the giving of a new lease for a further term of three and one-half years, and that inasmuch as the lessee failed to exercise his privilege for a new lease before the expiration of the first term, it is now too late and he is not entitled to a renewal of the term.

This doctrine may be sound in the case of ordinary leases for a term of years, but the rule does not apply to permanent leasehold estates. See *Taylor, Landl. & Ten.* (9 ed.) Sec. 332; *Worthington v. Lee*, 61 Md. 530; *Myers v. Silljacks*, 58 Md. 319; *Jones, Landl. & Ten.* 360, Sec. 339.

It has been held that the lessee remaining in the premises and saying nothing until after the expiration of the term gives him the right to a renewal for another term. The option or privilege of a renewal is his, and by remaining he is held to have exercised his privilege for a renewal, and where, as in the case at bar, the terms are exactly the same under the renewal as in the first term, there is no necessity for a new lease, as all the terms, conditions and covenants of the lease become operative and binding upon the exercise of the parties for a further term, upon the exercise of the privilege of a renewal by the lessee continuing on the premises after the expiration of his lease. 18 Am. & Eng. Enc. Law (2 ed.) 687c, 691; *Moss v. Barton*, 35 Beav. 197; *Clarke v. Merrill*, 51 N. H. 415; *Kelso v. Kelley*, 1 Daly (N. Y.) 419; *Willoughby v. Furnishing Co.* 93 Me. 185 [44 Atl. Rep. 612].

There is reserved to the lessor in the lease the right of re-entry for failure to pay the rent on demand, or the failure to pay the taxes when due; but the petition avers that no demand has been made for the rent

and the taxes have been paid to date. If the lessee's rights under the lease are to be forfeited for failure to pay the rent on demand, there must be a strict compliance with the terms of the lease. Forfeitures are not favored, and a court of equity will never enforce a forfeiture, but will frequently relieve against a forfeiture. *Adams v. Parnell*, 5 Circ. Dec. 190 (11 R. 565).

In order to exercise or declare a forfeiture in Ohio the common law practice must be resorted to, in the absence of an agreement or covenant in the lease giving the right to re-enter without demand. The landlord at common law was required to go upon the premises demised before sunset of the last day of the term, and in the most prominent and notorious place on the premises demand the exact amount of his rent due. *Boyd v. Talbert*, 12 Ohio 212; *Smith v. Whitbeck*, 13 Ohio St. 471.

There is a covenant for re-entry in the lease under consideration but it can only be made available after demand. There is no place mentioned where demand must be made, and inasmuch as a demand is necessary by the terms of the lease the common law rule is modified by the convention of the parties, so that the demand may be made personally or on the premises, but if on the premises it must be for the exact amount of the rent due, and at the most notorious place on the premises, which would be at the door of the dwelling house thereon, if there be a dwelling house on the premises; and by the covenant of the lease this demand might be made as well after the rent is due as before, and at any time of the day. There is nothing averred in the petition to indicate that this demand had been made for the rent personally or on the premises, but on the contrary it is averred that no demand was ever made.

Even if all the terms of the lease had been broken, nevertheless a court of equity would relieve the lessee against a forfeiture, if the lessor could be made whole and all arrearages paid up.

An action for ejectment after a forfeiture is the appropriate remedy to recover possession of the demised premises. Section 5781 Rev. Stat.; *Adams v. Parnell*, *supra*.

By allowing the plaintiff to remain in the premises after the expiration of the term without making a demand for the exact amount of the rent due, and on the day when due, the lessor, Foster, waived the right of forfeiture for the rent unpaid and past due. *Buford v. Weigel*, 3 Dec. 55 (2 N. P. 285).

The conclusion of the court is that the plaintiff is now, or was at the time the judgment in forcible entry and detainer was rendered against him in Justice Muller's court, lawfully in possession of the premises from which it was sought by said proceedings to dispossess

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him, and the motion to vacate the temporary restraining order will therefore be overruled.

NEGLIGENCE—PLEADING.

[Hamilton Common Pleas, January, 1909.]

THEODORE GRAU V. GEORGE MAGIS, JR., ET AL.

1. FAILURE TO FILE STATEMENT OF GROUNDS OF DEMURRER IS GROUND FOR STRIKING IT FROM THE DOCKET.

Failure to file with a demurrer a brief statement of the grounds relied on, as required by rules of practice is ground for striking the demurrer from the docket.

2. PETITION CHARGING MINOR DEFENDANT WITH NEGLIGENCE IN NEGLIGENTLY HANDLING GUN NOT DEMURRABLE.

In an action against a minor defendant, the petition is not subject to demurrer where it is alleged that the plaintiff sustained personal injury through the discharge of a gun negligently handled by the defendant.

L. J. Hoppe, for demurrer.

Roettinger & Kinney, contra:

Cited and commented upon the following authorities: *Davis v. Guarnieri*, 45 Ohio St. 470 [15 N. E. Rep. 350; 4 Am. St. Rep. 548]; *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326 [64 N. E. Rep. 130]; 29 Cyc. Law & Proced. 591; *Kahn v. Burette*, 42 Misc. 541 [85 N. Y. Supp. 1047]; *Pinney v. Hall*, 156 Mass. 225 [30 N. E. Rep. 1016]; *Kaples v. Orth*, 61 Wis. 531 [21 N. W. Rep. 633]; *Klitzke v. Webb*, 120 Wis. 254 [97 N. W. Rep. 901]; *Dohn v. Dawson*, 84 Hun. 110 [32 N. Y. Supp. 59]; *Atchison v. Plunkett*, 8 Kan. App. 308 [55 Pac. Rep. 677]; *Dixon v. Pluns*, 98 Cal. 384 [33 Pac. Rep. 268; 20 L. R. A. 698; 35 Am. St. Rep. 180]; *Mulcairns v. Janesville*, 67 Wis. 24 [29 N. W. Rep. 565]; *Judson v. Powder Co.* 107 Cal. 549 [40 Pac. Rep. 1020; 29 L. R. A. 718; 48 Am. St. Rep. 146]; *Tahse v. Omnibus Co.* 13 Dec. 231; affirmed, *Cincinnati Ry. Omnibus Co. v. Tahse*, 14 Dec. 679 (6 N. S. 502); *Hayes v. Smith*, 62 Ohio St. 161 [56 N. E. Rep. 879]; *Mt. Adams & E. P. Inc. Pl. Ry. v. Isaacs*, 10 Circ. Dec. 49 (18 R. 177); *Cincinnati Trac. Co. v. Holzenkamp*, 74 Ohio St. 379 [78 N. E. Rep. 529; 6 L. R. A. (N. S.) 800; 113 Am. St. Rep. 980]; *Shearman & Redfield, Negligence* (5 ed.) 59.

ORMAN, J.

This is an action sounding in tort against an infant nineteen years of age, alleging negligence in carrying a gun which was discharged by reason of the minor defendant's said negligence, resulting in serious personal injury to plaintiff.

Grau v. Magis.

A general demurrer is filed by the minor defendant on the ground that the petition does not state facts sufficient to constitute a cause of action against the defendant. This demurrer might have been stricken from the docket as for want of prosecution for failure of the party filing the demurrer to comply with rule 8 of the rules of practice of this court, by filing with the demurrer a brief statement of the grounds upon which the demurrer is filed with citation of authorities relied upon.

It is averred in the demurrer that the allegations of the petition do not state facts sufficient to constitute a cause of action, but why they do not we are left to conjecture. Is it because the action is against a minor? The principle is well settled that an infant is liable in an action *ex delicto* for all injuries to person or property committed by him. 2 Kent's Commentaries 241; Cooley, Torts 103; *Lacker v. Ewald*, 11 Dec. 337 (8 N. P. 204).

The averments of the petition are abundantly sufficient to charge the defendant with actionable negligence. *Davis v. Guarnieri*, 45 Ohio St. 470 [15 N. E. Rep. 350; 4 Am. St. Rep. 548].

If it be contended that the averments of the petition do not show a case of *res ipsa loquitur*, or in other words, that the accidental (if it be accidental) discharge of the defendant Magis' gun would not have occurred in the ordinary course of events if Magis, who had possession and control of the gun, had used proper care, in the absence of any other evidence than the fact that the gun was discharged, it will be a sufficient answer to say that a comparison of the language employed in the petition with the evidential facts set out in the following authorities will, we believe, satisfy counsel for defendant that the demurrer is not well taken. See *Kahn v. Burette*, 42 Misc. 541 [85 N. Y. Supp. 1047]; *Randall v. Lovell (City)*, 156 Mass. 255 [30 N. E. Rep. 1020]; *Kaples v. Orth*, 61 Wis. 531 [21 N. W. Rep. 81]; *Cincinnati Trac. Co. v. Holzenkamp*, 74 Ohio St. 379, 384, 385 [78 N. E. Rep. 529; 6 L. R. A. (N. S.) 800; 113 Am. St. Rep. 980]; Cooley, Torts 799.

The demurrer will therefore be overruled.

SUNDAY LAWS.

[Hamilton Common Pleas, 1908.]

SCOTT B. HOLOWAY v. STATE OF OHIO.

TRIAL AND PUNISHMENT FOR VIOLATING SUNDAY CLOSING LAW MUST BE FOR FIRST OFFENSE NO SECOND OFFENSE BEING CHARGED.

Where an affidavit charging keeping a saloon open on Sunday does not charge that it was a second offense, the trial must be for a first offense and the penalty imposed must be within the limitations prescribed for a first offense.

ERROR to Mayor's court.

F. M. Gorman, for plaintiff in error.

G. W. Grabbe, for defendant in error.

WOODMANSEE, J.

This proceeding is brought to reverse a judgment of the Mayor's court of the village of Delhi, of Hamilton county, Ohio, which judgment was that the defendant, in the case before him, pay a fine of \$50 and the costs of prosecution.

The proceeding was originally brought under Rev. Stat. 4364-20 (Lan. 7259). An affidavit, as a basis for warrant, was duly filed. and at the trial the defendant filed a motion for a jury trial, which was overruled. He, thereupon, filed his answer of examination, and asked to be bound over to the common pleas court, which was refused, to which an exception was taken.

Was the defendant entitled to a jury? Sec. 4364-20 (Lan. 7259) Rev. Stat. prescribes the penalty for keeping open a saloon on Sunday to be a fine in a sum not to exceed \$100, nor less than \$25 for the first offense; and for each subsequent offense shall be fined not more than \$200, or be imprisoned in the county jail or city prison not less than ten days, and not to exceed thirty days, or both.

The affidavit filed in this case does not charge a second offense. It could be tried only as a first offense, and the penalty must be within the term prescribed by the statute for the first offense. Had the judgment of the court in this case included imprisonment it would have been contrary to law, because the plaintiff, under such circumstances, would be entitled to a trial by jury. It is an anomalous situation that the plaintiff in error insists that if he is guilty at all it is for a graver offense than that charged, and that upon a proper hearing he would be subject to imprisonment. He was not entitled to a trial by jury, and the mayor was authorized to hear the cause.

"In order that a person charged in one affidavit with selling liquor contrary to the statute on more than one occasion may be entitled to a jury, or punished as for a second offense, the affidavit must show a former conviction and that a particular sale is charged as a second or repeated offense." *Kubach v. State*, 25 O. C. C. 488 (2 N. S. 133).

"Unless such affidavit charges the particular sale to be a second or subsequent offense, imprisonment cannot be imposed as a part of the punishment, and a justice of the peace with whom the affidavit is filed, has jurisdiction to try the accused without the intervention of a jury." *State v. Smith*, 69 Ohio St. 106 [68 N. E. Rep. 1044]; *Inwood v. State*, 42 Ohio St. 186.

I find no error in this proceeding, and the mayor's judgment will be affirmed.

HABEAS CORPUS—CRIMINAL LAW—SENTENCE.

[Hamilton Common Pleas, July 3, 1908.]

WILLIAM HARRINGTON, EX PARTE.

HABEAS CORPUS FOR RELEASE OF WORKHOUSE PRISONER ESCAPING FROM PENITENTIARY AND RETURNED.

Habeas corpus will not lie for the release of a prisoner from the workhouse, whose term of sentence thereto was interrupted by his being returned to the penitentiary, from which he had escaped, to complete his sentence there.

WOODMANSEE, J.

The testimony in this case is that Harrington, while an escaped convict from the Ohio Penitentiary, was arrested in Cincinnati and brought before the police court for housebreaking. He pleaded guilty to three separate offenses and was sentenced to the workhouse. The day following his commitment to the workhouse he was taken to the Ohio Penitentiary to serve out the remainder of his term. When that term was completed Harrington was returned to the Cincinnati workhouse. It is now claimed by his counsel that the fact of his being taken out of the workhouse operates as a release or discharge from further commitment, and this proceeding in habeas corpus is instituted to secure his liberty.

BANKRUPTCY.

[Hamilton Common Pleas, 1908.]

LOUIS L. SADLER V. CITY HALL BANK.

TRUSTEE IN BANKRUPTCY CANNOT RECOVER BANK DEPOSITS OF DEBTOR.

An action will not lie by a trustee in bankruptcy to recover from a bank deposits made by the bankrupt, the ownership of which is claimed by various parties.

Robertson & Buchwalter, for demurrer.

G. C. Wilson and J. R. Schindel, contra.

WOODMANSEE, J.

The plaintiff, as trustee in bankruptcy of the firm of Rabenstein Harris & Conner, filed a petition in this case to recover \$3,674.01 that was on deposit with the defendant bank at the time proceedings in bankruptcy were instituted.

Plaintiff claims that the money on deposit was a fund arising from the sale of certain live stock that had been consigned to Rabenstein Harris & Conner by certain persons who are now creditors of the firm.

and that the nature of the business relations between the bank and the bankrupt firm was such that this deposit was in the nature of a trust fund, and should go to the trustee in bankruptcy for those particular creditors. The bank claims the right to apply the deposit on the indebtedness of the firm to it, and while this does not arise on demurrer the court is clearly of the opinion that the matter is not a cause of litigation between the trustee in bankruptcy and the bank, but rather between the bank and the parties who claim the fund. If those creditors are entitled to the fund there is no reason why it should pass through the hands of the trustee in bankruptcy any more than that the funds arising from collateral security held by one creditor should pass into the control of the trustee for proper application.

Demurrer sustained.

LIBEL AND SLANDER—PLEADING.

[Hamilton Common Pleas, February, 1909.]

EDWARD DRUCK V. AUGUST KAHLE ET AL.

NECESSITY FOR AVERRING EXTRINSIC FACTS BY WAY OF INDUCEMENT.

Words not libelous *per se* used in a circular not being in the absence of any extrinsic facts by way of inducement, fairly susceptible of the meaning ascribed to them by the innuendo set out in the petition demurrer lies.

M. C. Lykins, for plaintiff.

G. C. Wilson, for defendant.

GORMAN, J.

The alleged libelous words set out in the petition are as follows: "October, 1908," "list of tenants," "list of lately reported tenants," "supplement to July, 1905, issued," "information regarding them may be of interest to you," "by comparing the key number with membership list you can find owners name and address," "Ed. Druck, 1046 Noble Court, electrician." "K., 18."

These words are perfectly harmless, standing alone without inducement or innuendo. It cannot be claimed that they are libelous *per se*, in the absence of some inducement to show where they were published, for whom they were intended to be read, among whom the circular circulated, and how the said words were understood by the persons who should read them.

The petition merely alleged that on the — day of October, 1908, the defendants falsely and maliciously published and printed in a printed circular said false and malicious statement of and concerning

plaintiff. There is no statement by way of inducement that the publication was made for, and intended to be read by, persons owning houses, rooms or flats for rent; that it was published to be read by landlords, nor any other statement by way of inducement that would enable either a jury or a court to say that these words, harmless as they stand, and not libelous apart from some extraneous facts not pleaded, were understood in a libelous sense by those who read them or might read them.

What extrinsic facts are pleaded to show that these words, seemingly harmless, derive a libelous import from the existence of circumstances such as the relations of the parties or other facts which might have been pleaded by way of inducement? In this case it appears to be necessary to state some extrinsic facts as inducement to show that these words were intended to be and were understood by the readers to be defamatory. Section 5093 Rev. Stat. does not in this case relieve the plaintiff from averring as inducement some extrinsic facts which justify the imputed actionable meaning, such as that the key referred to will show the meaning of the words to be what the pleader claims them to mean, and that the readers of the circular knew or could ascertain the meaning by a reference to the key. *Hamm v. Wickline*, 26 Ohio St. 81, 85; *Powers v. Seaton*, 2 Dec. Re. 365 (2 W. L. M. 532); *Frank v. Dunning*, 38 Wis. 270; *Harris v. Zanone*, 93 Cal. 59 [28 Pac. Rep. 845]; *Steele v. Edwards*, 8 Circ. Dec. 161 (15 R. 52).

Again the petition sets out by way of innuendo that said words meant that the plaintiff, Edward Druck, failed and refused to pay his rent, and that he had been compelled to move from the premises of the defendant, August Kahle, No. 1046 Noble Court, Cincinnati, Hamilton county, Ohio.

Where the language complained of will bear the meaning ascribed to it by the innuendo, whether such was the meaning or not is a question for the jury. *State v. Smiley*, 37 Ohio St. 30 [41 Am. Rep. 487].

But it is for the court to say whether or not the language used is fairly susceptible of the meaning averred by the innuendo. If it is fairly susceptible of that meaning then the question of fact as to whether or not the defendant meant to use the words in a libelous sense must be left to the jury.

The court in the first instance must determine whether or not the words used will bear the meaning ascribed to them by the innuendo. *State v. Smiley*, *supra*:

In the case at bar the court is of the opinion that the language used in the printed circular in the absence of any extrinsic facts by way of inducement is not fairly susceptible of the meaning ascribed to the words by the innuendo set out in the petition.

This case at bar can readily be distinguished from the cases cited by counsel for plaintiff.

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In the case of *State v. Smiley*, *supra*, cited by counsel for plaintiff, the language employed was a statement that someone had broken into Calvin Cook's house while the family was away and had stolen \$30 in money and clothes to the same amount. No suspicious-looking characters were seen in the neighborhood; then follows a statement that the house of T. S. Collins (the prosecuting witness), where the stolen goods were supposed to be secreted, was searched, but no trace was found. Surely no court would fail to say that such words were fairly susceptible of meaning that T. S. Collins' home was searched under process of law for the purpose of discovering stolen goods and discovering the proof of the guilt of said Collins with respect to the larceny of the same. The court of common pleas quashed the indictment in this case because the court held that the words were not susceptible of the meaning ascribed to them by the innuendo. The Supreme Court held this to be error and that the words used were fairly susceptible of the meaning ascribed to them by the innuendo. Can anyone doubt the correctness of the decision of the Supreme Court in this case?

In the case of *Getchell v. Tailors' Exchange*, 11 Dec. Re. 390 (26 Bull. 233), the defendant had published of the plaintiff the following:

"On Thursday, December 5, 1889, between the hours of twelve and one o'clock the Merchant Tailors' Exchange will offer the following judgments for sale at the rooms of the Exchange, 257 Walnut street, fourth floor."

"Delinquent, Getchell, Z.; business, roofer and assistant preacher; residence, Grand avenue, Price Hill; amount, \$84.15 and costs."

The court, Judge Rufus B. Smith, announcing the opinion, held that the word "delinquent," which appeared above plaintiff's name is itself a word of ambiguous meaning, and that when applied to a merchant cannot mean anything else than that he has proved dishonest and attempted to evade the payment of his debts, and the court found that this word under all the circumstances under which it had been used as shown by the inducement was fairly susceptible of a defamatory meaning and the question should go to the jury as to whether or not it was so intended.

In the case of *Hilbrant v. Simmons*, 9 Circ. Dec. 566 (18 R. 123), the court is of the opinion that the language employed could be fairly susceptible of no other meaning than that ascribed to it by the innuendo and the court could scarcely do otherwise than hold that on the words, innuendo and inducements of the case, it should have gone to the jury. In the case of *Gohen v. Volksblatt Co.* 1 Dec. 283 (31 Bull. 111), Judge Saylor held that language, much stronger than that employed in the case at bar, was not susceptible of the meaning ascribed to it by the innuendo; and that on a demurrer to the petition the plaintiff had not shown a cause of action. He further held that the innuendo means no

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more than the word "meaning." It may apply to what is already expressed, but cannot add to, nor enlarge nor change the sense of, the previous words. Inasmuch as the court is of the opinion that by no innuendo which can be employed can the words ascribed to the defendant be stretched into meaning what the plaintiff claims they mean, without the use of any inducement other than now employed in the petition, the demurrer to the petition must be sustained.

PUBLICATION—STREETS.

[Hamilton Common Pleas, December, 1908.]

IN RE VACATION SHERMAN AVE., WYOMING.**1. NOTICE OF APPLICATION TO VACATE STREET BY PUBLICATION SUFFICIENT.**

Notice by publication of an application to vacate a street is sufficient to give the court jurisdiction.

2. STATUTE AUTHORIZING NOTICE BY PUBLICATION TO VACATE STREETS HELD VALID.

Section 2656 (Lan. 3941; B. 1536-149) Rev. Stat. providing for giving notice by publication having been in existence for many years substantially as it is now, and having been recognized by the Supreme Court in numerous cases, a claim that notice given by publication is void because of the unconstitutionality of the statute, will not be sustained.

SWING, J.

At a former term of the court a judgment was rendered and entered upon the journal vacating Sherman avenue, in the village of Wyoming. I am asked now by the village, the application being made after the term at which the judgment was entered, to set aside the judgment and grant leave to the village to file an answer in the original proceeding resisting the vacation.

The village claims that it did not have actual notice or any knowledge of the filing of the petition to vacate. But the statute, Sec. 2656 (Lan. 3941; B. 1536-149) Rev. Stat., provides for notice by publication, and such notice was given.

I am of opinion that the notice by publication according to the statute was all that was required to give the court jurisdiction, and that it is not in my power now to vacate the judgment and open up the proceedings. See *Paine v. Mooreland*, 15 Ohio 435, 444, 445 [45 Am. Dec. 585]. It is said in that case:

"Notice by publication is not process, but, in certain cases in contemplation of law, is equivalent to service of process."

Also, *Callen v. Ellison*, 13 Ohio St. 446, 453:

"Jurisdiction of the person is properly acquired by personal notice

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or service of process; but other modes have been substituted by express provision of law or the practice of courts—as publication,” etc.

Also, *State v. Guilbert*, 56 Ohio St. 575 [47 N. E. Rep. 551; 38 L. R. A. 519; 60 Am. St. Rep. 756], as bearing on the question, where it is held that the legislature may “in the exercise of legislative discretion, provide a substituted service of process,” etc.

Also, *Plumb v. Robinson*, 13 Ohio St. 298, 303, 304. It is said in this case:

“Regarding the proceeding as *in rem*, the statute of 1831, as well as that of 1816, requires no one to be named in the petition or application as a party defendant, or to be served personally with a summons or other process, but requires only that notice of the intended application shall be given to all persons interested, by publication for six weeks, successively, in some newspaper printed in the county in which the application is to be made,” etc.

Such notice so provided by statute was recognized as valid.

Also, *Rawson v. Boughton*, 5 Ohio 328, as bearing on the subject, where the only “notice” required by the statute was by publication.

In view of these and other authorities that might be cited, without going into a discussion of the cases cited, I am of opinion, as I have said, that the notice provided by the statute and which was given in this case, by publication, was sufficient to give the court jurisdiction.

It was claimed before me in argument that the statutory provision as to notice by publication in this case is unconstitutional. But it was shown by authorities cited in the argument that the statute, which has been in existence, substantially as it is now as to such notice, for many years, has been recognized by our Supreme Court in numerous cases, and I do not feel warranted in now holding it unconstitutional.

For these reasons I feel compelled to deny the application of the village.

INTERROGATORIES—PARTIES.

[Hamilton Common Pleas, January, 1900.]

CHARLES M. STANLEY v. I. M. MARTIN.

DEMURRER LIES TO INTERROGATORIES TO DISCOVER FROM AGENT NAMES OF PRINCIPALS TO MAKE THEM PARTIES.

An action not being maintained against both an agent and a principal, demurrer lies to interrogatories filed in an action on a contract with one who was supposed to have been acting for others, the purpose of the interrogatories being to discover the names of his principals in order to make them parties.

L. M. Hosea, for plaintiff.

Pogue & Pogue, for defendant.

GORMAN, J.

The question hereby determined arises on a demurrer filed by the defendant to interrogatories attached to the petition on the grounds principally that the interrogatories are not pertinent to the issue. The action is brought against the defendant on a written contract signed by him, "I. M. Martin, Gen'l Mgr," and a copy thereof is attached to the petition.

The plaintiff claims that under said contract he was to receive from the defendant, Martin, for a period of seventeen weeks the sum of \$40 per week for exhibiting his (the plaintiff's) model submarine boat and appliances at Chester park, in this county, during the season of 1908, "as shown to Mr. Martin, Mr. Zarro and others at Chester park on Sunday, March 8, 1908." Plaintiff in his petition also avers that he was given to understand (by whom he does not state) that the defendant, Martin, "was acting not only on his own behalf, but as the agent and manager of another whose identity was not disclosed to plaintiff, but whose names plaintiff asks leave to add hereto as defendants when ascertained."

For the purpose of learning the names of all the persons, firms or corporations for whom Martin was acting in making the said written contract, seven interrogatories are annexed to the petition, the gist of the questions being to give the names and addresses of all persons associated with the defendant in the conduct of Chester park, and whether or not they approved or sanctioned the execution of the contract sued upon and were interested therein as their contract.

The proper method of raising objection to interrogatories is by demurrer. *Mullins v. Freund Roofing Co.* 17 Dec. 743 (5 N. S. 1).

The demurrer to these interrogatories will be sustained for the following reasons:

The answers sought to be elicited by these questions would not disclose any facts that would be pertinent to the issue. The statute, Sec. 5099 Rev. Stat., permits the annexation of interrogatories pertinent to the issue made in the pleadings. If the names and addresses of all the persons sought to be learned by these questions were made known, could they be now brought into this case and made parties defendant and asked to respond to a judgment in favor of plaintiff? This contract sued upon is either the contract of Martin or it is the contract of others for whom he was acting as agent. From the fact that he signed as general manager it may fairly be presumed that he was not contracting for himself individually, but for a principal. Now, it would seem to be elementary that an agent, who makes a contract in his own name,

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designating himself as agent or by any other term which implies agency, or if he signs his own name without designating his agency, can be held individually liable on the contract; if he fails to disclose his principal, or if his principal is unknown to the other contracting party, and this regardless of whether he was authorized or not to execute the contract. Story, Agency Sec. 264; *Trust Co. v. Floyd*, 47 Ohio St. 525 [26 N. E. Rep. 110; 12 L. R. A. 346; 21 Am. St. Rep. 846].

If the agent was authorized and failed to disclose his principal, the principal can also be held when discovered. *Tuthill v. Wilson*, 90 N. Y. 423.

But both the principal and agent can not be held jointly in an action on a contract. The plaintiff must elect which he will pursue. *Tuthill v. Wilson*, *supra*; *Borell v. Newell*, 3 Daly (N. Y.) 233; *Barrell v. Newby*, 127 Fed. Rep. 656; *Eels v. Shea*, 11 Circ. Dec. 304 (20 R. 527); *Lee v. Insurance Co.* 12 Dec. Re. 109 (1 Handy) 217; 2 Bates' New Pleading 905, 967.

If, therefore, the information sought by the interrogatories were in the possession of the plaintiff, it would not avail him because he could not join the unknown parties, who would be the principal of the defendant, Martin, with Martin as defendant, as this would be joining the principal and the agent in an action on a contract. If the information sought to be brought out by the interrogatories cannot be used to bring in the unknown parties, then the interrogatories are not pertinent to the issue. The avowed purpose of learning the names of these parties is to make them co-defendants of Martin, and this cannot be done under Sec. 5013 Rev. Stat., because this controversy can be determined without bringing in the unknown parties. It has been held that the power of the court to bring in new parties under this Sec. 5013 does not apply to actions at law, as is the case at bar, but only to equitable cases. *Webster v. Bond*, 9 Hun. 437.

The New York section applicable to bringing in new parties is the same as Sec. 5013 Rev. Stat. Nor does the power of the court to bring in additional parties apply where the plaintiff's right to maintain the action depends on the presence of such additional parties, but only where he can maintain the action against the original party, but the new party or parties is necessary to its complete settlement. In a suit against A for money of plaintiff alleged to have been received by A and it appears that the firm of A and B received the money, B cannot be brought in, as that would be equivalent to a new suit. *Newman v. Marvin*, 12 Hun. 236; Pomeroy's Remedies, Sec. 420; *McMahon v. Allen*, 12 How. Pr. (N. Y.) 39.

Nor could these new parties be brought in under Sec. 5114 Rev. Stat., giving the court power to amend in the interest of justice, because the claim of the plaintiff would be substantially changed by the

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addition of parties defendant whose names are not on the contract and can not be held under the contract, except upon the theory that it is their contract, in which event the plaintiff would be obliged to look to them and not to the defendant. The whole cause of action and the parties defendant would thereby be changed.

If the plaintiff desires to hold these unknown parties on this contract he must first ascertain who they are and whether or not they authorized Martin to execute this contract for them, after which he may be able to bring this action on the contract against them.

If the information cannot be learned in any other way, he may bring an action under Sec. 5293 Rev. Stat. for a discovery, and after the information is obtained he may bring his suit at law on the contract against the discovered parties. *Chapman v. Lee*, 45 Ohio St. 356; [13 N. E. Rep. 736]; *Graham v. Telephone & Tel. Co.* 15 Dec. 200 (2 N. S. 612).

CONSTITUTIONAL LAW—RAILROADS.

[Erie Common Pleas, November, 1908.]

STATE OF OHIO V. LAKE SHORE & M. S. RY.

1. STATE AUTOMATIC COUPLER ACT NOT IN CONFLICT WITH FEDERAL ACT.

The state automatic coupler act (98 O. L. 75) is not in conflict with the federal act relating to the same subject, and is not unconstitutional because relating to the same subject-matter.

2. PROCEEDINGS UNDER STATE ACT ARE CIVIL.

Proceedings under the state act are civil in their nature, and guilty knowledge and intention are therefore not essential elements of the offense.

E. O. Harrison and E. S. Stephens, Pros. Atty., for plaintiff.
Doyle & Lewis, for defendant.

REED, J.

On June 17, 1907, the plaintiff filed this action in the court of common pleas of Erie county, Ohio, setting forth that the defendant, the Lake Shore & Michigan Southern Railway Company, is a corporation duly and legally organized under the laws of the state of Ohio, and engaged in the railroad business, owning, operating and maintaining a line of railroad running in and through Erie county, Ohio. That at the time mentioned in the petition it was a common carrier engaged in transporting passengers and freight by its railroad.

The plaintiff sets forth as and for its cause of action against the defendant that on February 19, 1907, the defendant company, in violation of an act of the general assembly of the state of Ohio, passed March 19, 1906, entitled, "An act to promote the safety of employes and

travelers upon railroads by compelling common carriers by railroad in the state of Ohio, to equip their cars with automatic couplers, sill steps, grab irons, and continuous brakes," (98 O. L. 75) hauled over its line of railroad in Erie county, from a point at the intersection of Columbus avenue and Railroad streets to the Kelly Island Lime & Transportation Co.'s tracks in the city of Sandusky, a distance of about 2,700 feet, L. S. & M. S. car D-38591; that the automatic coupler on this car was at the time out of order, defective and broken; that the coupling chain clevis and lifting pin on the A end of said car were broken and inoperative, necessitating, in case of coupling it with another car, a man going between the cars to make the coupling; that this car by reason of its broken coupler would not couple automatically by impact, and that when coupled with another car could not be uncoupled except by a man going between the cars; and for this violation of the law the plaintiff seeks to recover the penalty of \$100 prescribed by the act for its violation.

It is admitted that the defendant is a corporation duly organized under the laws of the state of Ohio; that on or about February 19, 1907, the defendant hauled on its line of railroad from a point at the intersection of Columbus avenue and Railroad street in the city of Sandusky, in an easterly direction, to the tracks of the Kelly Island Lime & Transportation Co., in the city of Sandusky, Ohio, a particular car known as L. S. & M. S. car D-38591; and that at the time the uncoupling chain on one end of the car was broken, and the coupler was inoperative.

The defendant claims that this car was loaded with coal at the Bradley mines on the line of the Lake Erie & Western Railway Co. and consigned to the Kelly Island Lime & Transportation Co. at Sandusky, Ohio, (but the admitted facts are that it was consigned to the Kunz-Smith Coal Co. at Sandusky, Ohio); that this car was transferred to the Baltimore & Ohio railroad at Newton Falls, Ohio, and by it transported to Sandusky, Ohio. The defendant claims that this car was delivered to it by the Baltimore & Ohio Railroad Co. a short distance from the tracks of the Kelly Island Lime & Transportation Co.; that it was transferred to these tracks where it was unloaded and inspected, and the defect in said coupling was then and for the first time discovered. It claims that the car was in no manner moved or transported except as was necessary to place said car on its repair tracks. It claims that it had no knowledge of the defective condition of said coupling prior to the inspection made immediately upon the unloading of said car while on the tracks of the Kelly Island Lime & Transportation Co. That immediately upon discovering said defective condition the car was placed upon the repair tracks where the defective coupling was promptly repaired. It claims it has used all due care in inspecting this car after

receiving it; that at no time was the car moved or transported by it after it had knowledge of its defective condition, and that, therefore, it has not violated the act of March 19, 1906, and the state is not entitled to recover the penalty sued for.

A jury was waived, and by agreement of the parties the case was submitted to the court upon an agreed statement of facts and the testimony taken by agreement in the absence of the court.

In the stenographic report of the testimony which was handed to the court there appears objection and exceptions to the introduction of certain testimony, questions calling for conclusions and answers which clearly state conclusions. The report shows that these objections were overruled and all testimony allowed to go in, some of which is clearly incompetent and should not be considered by the court. This incompetent testimony is utterly disregarded by the court and is not considered at all in reaching the conclusions which I have reached in this case. It is not necessary to specifically point out these questions and answers which the court holds to be incompetent; they are apparent from an examination of the questions and answers themselves.

The facts as agreed to in the case, other than those admitted by the pleadings, are as follows:

1. It is hereby agreed by the parties hereto that the defendant, the Lake Shore & Michigan Southern Railway Company, is and was at the time of the commencement of this action a corporation organized under the laws of the state of Ohio, and a common carrier engaged in transporting passengers and freight by a railroad operated and conducted by it in the state of Ohio.

2. That the said defendant on or about the nineteenth day of February, 1907, hauled on its line of railroad from a point at the intersection of Columbus avenue and Railroad street in its house yard, in the city of Sandusky, Ohio, in an easterly direction, to the Kelly Island Lime & Transportation Company's tracks, in the city of Sandusky, Ohio, Lake Shore & Michigan Southern Railway car Number D-38591.

3. That the defendant hauled said car said distance aforesaid when the uncoupling chain clevis and the lifting pin on the A end of said car were broken, out of repair, inoperative, and in such a condition that said car could not be coupled automatically by impact, unless the knuckle was open, or uncoupled without someone going between the ends of the cars for said purpose; that the coupler on the said A end of said car was in such a condition that it would not couple automatically by impact, unless the knuckle was open; and that the said coupler on the said A end of said car could not be uncoupled by means of the mechanism of said coupler without a man or men going between the ends of the car for that purpose.

4. That said car had been properly equipped with automatic

couplers coupling by impact, but that the same had become broken, inoperative and out of repair.

5. That said car was not loaded when hauled by said defendant from the intersection of Columbus avenue and Railroad street, but was hauled in the defective condition, described as aforesaid, to the said Kelly Island Lime & Transportation Co.'s tracks, as aforesaid, to be there loaded with sand for said defendant.

6. That the distance said car was hauled as aforesaid was about 2,700 feet.

7. That shortly before February 19, 1907, said car was loaded with coal at the Bradley mines on the line of the Lake Erie, Alliance & Western Railway Company, in the state of Ohio, and hauled over the line of said Lake Erie, Alliance & Western railway from Bradley Mines to Newton Falls, Ohio, where said car was transferred to the Baltimore & Ohio Railroad Company, and by the said Baltimore & Ohio Railroad Company hauled over its railway from Newton Falls, Ohio, to Sandusky, Ohio, where said car was unloaded by the Smith-Kunz Coal Company, to which said company said car load of coal was consigned; that said car, after being unloaded by said Smith-Kunz Coal Company was hauled by the Baltimore & Ohio Railroad Company, over its railway, to a point at or near the intersection of Columbus avenue and Railroad street, in the city of Sandusky, Ohio; and that said car was received by the defendant herein from the Baltimore & Ohio Railroad Company at the point last above described.

From this agreed statement of facts and the testimony which is offered, I conclude that on February 19, 1907, the defendant received from the Baltimore & Ohio Railroad Company a freight car with the automatic coupler in a defective condition to such an extent that it would not couple automatically by impact, nor could it be uncoupled without a man going between the cars to perform some service in connection therewith; that this car was hauled for a distance of 2,700 feet to the tracks of the Kelly Island Lime & Transportation Company for the purpose of being loaded with sand; that the car was loaded in the state of Ohio with coal and consigned to Sandusky in the state of Ohio, so that at no time between the time the car was loaded at Bradley Mines and the time it was in on the Kelly Island Lime & Transportation Company's tracks to be loaded with sand was it engaged in interstate commerce.

The state asserts that upon this state of facts the defendant company has violated the automatic coupler act, and is liable to the penalty therein prescribed.

The defendant claims that this being in its nature a penal statute, the court is not justified in assessing this penalty against the defendant unless it find beyond a reasonable doubt that at the time the defendant

company knew of the defective condition of this coupling before it hauled it, or by the exercise of reasonable care could have known it. And it contends that there is nothing in the admitted facts or the evidence which would warrant such a finding, and therefore it should be discharged from liability under this complaint.

It has been suggested that the act under which this prosecution is instituted is unconstitutional in that it attempts to regulate interstate commerce; that congress has the exclusive power to regulate traffic between the states and the instrumentalities of such traffic, including cars, locomotives and trains, and that congress has acted in this regard by enacting a law entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," which act was approved March 2, 1893, 27 U. S. Stat. at L. 531, and amended April 1, 1896, 29 U. S. Stat. at L. 85.

It should be added that the Lake Shore & Michigan Southern Railway Company has a line of railway extending from Chicago to Buffalo engaged in an interstate commerce traffic.

If this act is an attempt to regulate interstate commerce, it will not be gainsaid that it is unconstitutional. And this is true whether congress has acted or not, if the exclusive power lies with congress. If the exclusive power to regulate interstate commerce is vested in congress, then a state may not act.

A distinction must be drawn between an act which attempts to regulate commerce between states and an act which attempts to regulate the means by which commerce is carried on within a state.

Section 2 of the act of congress to which I have referred reads as follows:

"That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 2 of the act under discussion, that is, the act of the legislature of the state of Ohio, approved March 19, 1906 (98 O. L. 75; Lan. Rev. Stat. 5353; B. 3365-27b), reads as follows:

"It shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars."

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The two sections are identical, except that one provides for automatic couplers on cars engaged in interstate commerce, and the other provides for cars engaged exclusively in interstate commerce. Can it be said that the act under discussion is an attempt to interfere with the right of congress to regulate interstate commerce? It seems clear to me that congress had in mind, when it passed this act, the fact that it had always conceded to the states the right to regulate the means by which commerce is carried on within the state. And acting at least upon the supposition that it had a right to regulate and control intrastate commerce, many laws having been enacted for the protection of life and property, and the regulating and control of railroads, which from time to time have been enforced without a suspicion that they had in any wise conflicted with the rights of the general government. Clearly congress in limiting the operations of the automatic coupler act to which I have referred to cars engaged in interstate commerce traffic intended to leave open to the state the right to take such action as it might deem advisable for the safety and protection of employes and travelers upon the railroads wholly within the state.

The act under discussion does not attempt to regulate interstate commerce, nor does it conflict with the act of congress requiring automatic couplers upon cars engaged in interstate commerce. The federal enactment is not designed to nor does it apply to cars engaged in intrastate traffic. The act of the legislature under which this case is instituted is not designed to nor does it apply to cars engaged in interstate commerce. The two acts construed together cover the whole field of railroad operation and require that all cars either engaged in interstate or intrastate commerce be equipped with automatic couplers. and suits may be prosecuted under either law as the facts of the case may be.

In this particular case the car was engaged in strictly intrastate traffic, and if there is any violation of the law at all it is a violation of the act of March 19, 1906. It cannot be said that the federal law has been violated; and if the act of 1906 is unconstitutional because it conflicts with the right of congress to regulate commerce, then we are in this dilemma—congress always refusing to interfere with the means by which commerce is carried on within a state affords no relief, and the state being unable to pass lawful acts requiring these things to be done for the safety of employes and the traveling public, all traffic within the state is carried on with cars not provided with these automatic couplers. It cannot be said that such a paradoxical situation presents itself. As I view it the law is constitutional. In support of this conclusion I cite *Missouri, Kan. & T. Ry. v. Harber*, 169 U. S. 613 [18 Sup. Ct. Rep. 488; 42 L. Ed. 878]; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 [20 Sup. Ct. Rep. 96; 44 L. Ed.

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136]; *Lord v. Steamship Co.* 102 U. S. 541 [26 L. Ed. 224]; *Milnor v. New Transportation Co.* 65 U. S. Appdx. [16 L. Ed. 799].

The principal contention that the defendant makes in this case is that it is a criminal proceeding, and therefore knowledge and intention are elements which enter into it and must be found to exist in order to warrant the court in assessing the penalty. That in this particular case there is no evidence of knowledge or that the company could by the exercise of reasonable care have discovered the defective coupler, and therefore the defendant cannot be required to pay the penalty prescribed for a violation of the law.

If it is a criminal proceeding, then the contention of the defendant is right. The claim of the defendant is based largely upon the fact that the act itself makes it unlawful to haul a car within the state not equipped with an automatic coupler, so that the car can be coupled with other cars and uncoupled without men going between the cars, and it provides a penalty for \$100 for each violation of the act. If it is a penal statute, then of course knowledge and intention are ingredients of the offense which must be proven. But is it? The mere fact that the word *unlawful* appears in the act does not make it a penal or criminal statute. Section 6 of the act 98 O. L. 76 provides:

Section 6. "That any such common carrier using or permitting to be used or hauled on its line any locomotive, tender, car, or similar vehicle, or train, in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the prosecuting attorney in the common pleas court of the county having jurisdiction in the locality where such violation shall have occurred."

Prior to the enactment of the act of 1906 the law provided that every railroad company should equip or have its cars equipped with automatic couplers substantially the same as the present law, and it further provided that for each violation of the act there should be a forfeiture to the state of Ohio of the sum of \$25 for each day such defective coupler was used, to be collected in a civil suit in any county in the state where service could be had on the road violating the law, and it was made the duty of the attorney-general or the prosecuting attorney of the county wherein the act was violated to prosecute the suit.

The present law differs from the original act in that the word *civil* is omitted, and the jurisdiction is limited to the locality wherein the violation occurs. The original act was in this respect like many of the other acts upon our statute books in the nature of police regulations wherein penalties are prescribed to be collected for the use and benefit of the state by civil actions. What is commonly known as the "Winn Law" has in it a provision similar to this one, providing that penalties

are to be collected by civil actions brought in the name of the state of Ohio. This act has been sustained. In prosecutions under it the rules of evidence which pertain to civil procedure have been applied. *State v. Allen*, 6 Dec. 43 (3 N. P. 201).

In bastardy proceedings under the law of this state, where the court has power to imprison to enforce its order and judgment, the authorities are to the effect that it is in fact a civil proceeding, only quasi-criminal, and that in the trial of such cases the code of civil procedure is applicable.

3 Bates, Pl. & Pr. 2420, discussing this class of cases, says, "The action is a civil action," and in support of this cites *Wright v. Munger*, 5 Ohio 441; *Mack v. Bonner*, 3 Ohio St. 366. A number of other authorities are cited which while not directly in point bear out the statement that it is a civil proceeding. In further support of this proposition I cite *State v. Zillman*, 121 Wis. 472 [98 N. W. Rep. 543]; *Jutte v. Hughes*, 67 N. Y. 267, 269.

The defendant claims that wrongs are divided into two classes, private wrongs and public wrongs, and that the test as to whether or not a law is penal in the strict and primary sense is, whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. That the former are infringements or privations of the private or civil rights belonging to individuals, considered as individuals, and are civil injuries. That the latter are breaches and violations of public rights and duties which affect the whole community, considered as a community, and are distinguished by the harsher appellations of crimes and misdemeanors. In support of this proposition my attention is called to the case of *Clyatt v. United States*, 197 U. S. 207, 222 [25 Sup. Ct. Rep. 429; 49 L. Ed. 726]. In other words, it is claimed that if this penalty was payable to an individual who might be required to go between the cars to adjust this coupling, it would be a civil injury; but inasmuch as it is a penalty which is collected by the state, it is a penal statute. That is to say, crime.

In the case of *Inwood v. State*, 42 Ohio St. 186, the defendant was being prosecuted under Sec. 3 of the act of Feb. 17, 1831 (29 O. L. 161; Sec. 6896 Rev. Stat.), "for the prevention of certain immoral practices" which provides,

"That if any person or persons shall at any time interrupt or molest any religious society, * * * the person or persons so offending shall be fined in any sum not exceeding twenty dollars; and any judge of the court of common pleas, or justice of the peace, within the proper county, be, and they are hereby empowered, authorized and required to proceed against, and punish every person offending against the provisions of this act; and upon view and hearing, may, or on information given on oath or affirmation, shall, if need be, issue his war-

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rant to bring the body of the accused before him, and shall inquire into the truth of the accusation; and if guilty, shall enforce the penalty of this act annexed to the offense; and said offender, (if the judge or justice should think necessary,) may be detained in custody and committed until sentence be performed."

A warrant was issued, he was arrested, taken before the court and found guilty. The question was raised that this law was unconstitutional because it deprived the defendant of the right of a trial by jury. Reading from page 189.

"The question is: Was the phrase 'in any trial, in any court' intended to apply to cases like the present, where the penalty is by fine, merely, inflicted on the violator of a mere police regulation, only *quasi*-criminal? A class of cases for the punishment of immoral and pernicious practices by pecuniary penalties, but in which, by the common law, as above shown the accused was never entitled to demand a trial by jury. The provision of the constitution is, that the person accused shall have a speedy public trial by an impartial jury of the county or district in which the *offense* is alleged to have been committed. Accused of an *offense*—to wit; such an offense as would, before the adoption of the constitution, have entitled the accused to a jury trial. This provision, in our opinion, was not intended to extend the right of jury trial, but was intended to define the characteristics of the jury.

"In *Thomas v. Ashland*, 12 Ohio St. 124, it was held, that an ordinance of a village which imposed imprisonment as a penalty for an offense, where no provision was made for a trial by jury, was in conflict with section 10 of the 1st article of the constitution above quoted; but the court was careful to exclude from the operation of the rule there laid down, cases where the punishment was by fine only, although imprisonment was authorized as a means of enforcing the payment of the fine. We think the discrimination between imprisonment as part of the penalty, and as a means of enforcing the penalty, is well made."

In this decision the Supreme Court speaks of this police regulation as only *quasi*-criminal in its nature, and in case wherein imprisonment may be resorted to enforce the collection of a fine.

In the case of *Champaign Co. (Comrs.) v. Church*, 62 Ohio St. 318 [57 N. E. Rep. 50; 48 L. R. A. 738; 78 Am. St. Rep. 718], reading from the opinion of Judge Davis on page 345,

"The contention is that the statute deprives the defendant of the right to have the amount to be paid assessed by a jury as damages. A county or municipality can no more complain of this statute as an infringement upon the right of trial by jury, than the man who has been tried by a jury and found guilty of a crime, can complain that the law under which he is tried does not provide that the jury shall assess the amount of his fine, or adjudge the extent of his imprisonment.

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The primary purpose of the legislature was punishment and correction. The expressed object of the law is 'the suppression of mob violence.' That the legislature might, in the exercise of the police power, fix the amount of a penalty without the intervention of a jury was long ago decided by this court in *Cin. S. & C. Ry. v. Cook*, 37 Ohio St. 265. And this being so, it is no concern to the party paying the penalty, to whom the state, in its sovereignty, may pay it. It may well, as under this statute, turn the money over to those who suffer by the act of lynching. In this respect, it makes no difference whether in the statute it be called a penalty, or compensation, or damages. Nor does it alter the case that the amount is fixed, that is, determined by the statute, as in this case; or that it is to be found by a jury. Nor yet does it matter that it is declared to be 'for the suppression of mob violence,' as in this case, or 'for compensating parties whose property may be destroyed in consequence of mobs or riots,' as in the statute which was upheld in *Darlington v. New York (Mayor)*, 31 N. Y. 164, 187; because the imposition of any amount by authority of the state is, in either case, essentially penal and corrective in its nature. The party paying the money so recovered, that is, as a penalty, has no right to complain that the sovereign pays it over to the person injured, or pays it for the benefit of the minor children of a person suffering death by lynching, or to the next of kin of such person; nor that the sovereign provides that 'such recovery shall not be regarded as a part of the estate of the person lynched, nor be subject to any of his liabilities.' Nor is it a matter which can be put in issue for trial by jury; for the legislature does not authorize, nor attempt, a compensation of the injury, to be settled on an inquiry of damages."

It seems to me that this reasoning applies in this case; that is, it makes no difference to the defendant whether the penalty goes to the state or to the individual. The legislature has enacted, in the nature of a police regulation, a requirement that railway companies shall equip their cars with automatic couplers, and has provided a penalty for a failure to so do, and that the same shall be collected by suit brought by the prosecuting attorney, in the locality where the violation takes place; and the fact that the amount collected as a penalty goes to the state does not make it a criminal statute so that knowledge and intention are ingredients of the offense which must be proven, beyond a reasonable doubt, to warrant a finding that the law has been violated and the assessment of the penalty.

The object and purpose of this law is to protect the employes and the traveling public, and it would be unwise to give this law such a construction as to destroy the object and purpose of its enactment.

The defendant claims that the law should be liberally construed because of its harsh nature. Rather should it be reasonably construed

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to give it that force and effect which will insure to the public the protection which it affords.

It is not necessary in this decision for me to determine what the law would be in case it should develop on the trial that this coupler became out of repair while the car was being transported, and that at the first opportunity the car was repaired. Considerations of justice might under some circumstances warrant a court in submitting to a jury such a defense. But in this case the coupler was broken and inoperative at the time the defendant received it. It moved this car 2,700 feet in that condition for the purpose of having it loaded, and no matter what view the court might take of the law upon a state of facts different from the admitted facts and evidence in this case, the defendant is clearly liable for the penalty prescribed for a violation of this act.

In determining these questions the court should have in mind a due regard for the rights of the employes of these companies as well as the companies themselves. The object and purpose of all such regulation is to protect those who are required to earn a livelihood by working in more or less dangerous places. Railroading is a hazardous business. Many men are required to follow that business for a livelihood, and the legislature in its wisdom has seen fit to throw around these men some safeguards that they may not be unnecessarily deprived of their limbs, and oftentimes of their lives, by being compelled to go between cars to make couplings.

If this law is to be liberally construed so that a company may avoid liability by simply pleading ignorance of the condition of its cars and a want of intention to violate the act, then the very purpose of it is defeated. No injustice can be done by holding railroad companies to a strict accountability under this act, and should it result in the execution of a penalty at some time when it appears to be harsh, it is far better than that the court should give this law such a construction as would permit companies to be derelict in this respect, endangering the lives and limbs of the employes of the company and the traveling public. Considerations of humanity dictated the enactment of this law, and the same considerations call upon the courts to so construe the law and enforce it as will bring to those whom it was intended to safeguard the fullest and highest degree of protection which this law will afford.

The finding of the court is, that the defendant has violated the law and the penalty of \$100 will be taxed against it.

INTOXICATING LIQUORS.

[Columbiana Common Pleas, March 6, 1909.]

WILLIAM SAVORS V. STATE OF OHIO.

MUNICIPALITY UNDER BEAL LAW CANNOT PROSECUTE SALE OF INTOXICATING LIQUORS BEYOND LOW WATER MARK IN OHIO RIVER.

Jurisdictional limits of municipalities for punishment of offenses, unless increased by statute, do not extend beyond municipal limits; hence, a prosecution does not lie for sale of intoxicating liquors on a house boat anchored in the Ohio river beyond low water mark and adjoining a municipality which has taken advantage of act 95 O. L. 88 (Sec. 4364-20a Rev. Stat.), to prohibit the traffic in intoxicating liquors within its limits.

ERROR to mayor's court.

HOLE, J.

In this case the plaintiff in error seeks to reverse the judgment of the mayor's court in the city of East Liverpool, which resulted in his conviction and sentence to pay a fine of \$200 and costs.

A large number of errors are alleged, but practically the only one which has been argued by counsel was the question as to whether or not the evidence adduced was sufficient to prove the commission of the offense charged in the affidavit.

The question which is raised in this case is one of extreme importance. It appears, without contradiction, that the plaintiff in error, William Savors, was the owner or keeper of a house boat floating on the Ohio river at a point opposite Union street, one of the highways of the city of East Liverpool, in which boat it is alleged he unlawfully sold, furnished and gave away, or indirectly dealt in intoxicating liquors, contrary to the terms and provisions of the Beal local option law. It appears from the evidence that the boat, at the period covered by the affidavit, was anchored in the river at a distance of sixty to eighty feet from the water's edge on the Ohio side of the river. That it was afloat in at least three feet of water, and was held in position by wire ropes extending from anchors to each corner of the boat, which anchors rested on the bed of the river, and that there were three or four floats extending from the water's edge on the Ohio side toward the boat as it so lay anchored in the stream, and that these floats were entirely disconnected one with the other, but were near enough together for persons walking from the shore to the boat to step from one float to the other. The evidence in the record was clearly sufficient to justify the conviction of the plaintiff in error if the traffic in intoxicating liquors was unlawful at the place where said boat was anchored.

It is clear from the evidence that this boat was anchored beyond low water mark on the Ohio side of the river, and it is clear from the

records and decided cases that the territorial limits of Ohio only extend to ordinary low water mark on the Ohio side of the river.

Without going into the authorities at this time, it may be remarked that it is clear from many precedents, including one made by a homicide case in this county, that although the territorial limits of the state end at ordinary low water mark on the Ohio side, the jurisdictional limits of the state for the punishment of crimes and offenses extend entirely across the navigable portion of the Ohio river, though this jurisdiction for the punishment of crimes is exercised concurrently with the state of West Virginia and the state of Kentucky.

The Beal law which is alleged to have been violated in the case at bar, provides for submitting to the electors of a municipal corporation the question of prohibiting the sale of intoxicating liquors in such corporation, and when such election has been properly held and carried by the temperance forces, the sale of intoxicating liquors as a beverage shall be prohibited "within the limits of such municipal corporation."

During the progress of the argument it was admitted that the city authorities would have no jurisdiction to punish the violations of city ordinances if the alleged offenses were committed on the river beyond ordinary low water mark. It was claimed, however, that this being a state law, that the state would have a right to punish offenses if committed within the jurisdictional limits of the state, although not within the limits of the municipality.

The importance of the question under the Beal law and especially under the Rose local option law will be appreciated if we keep in mind the fact that if the state has no power to punish the sale of intoxicating liquors upon the river adjoining the various counties which have voted against the sale of intoxicating liquors, the practical administration of this great temperance measure will be defeated. So far as I know this question as affecting the administration of the Beal law has not yet been passed upon, but in *State v. Kendle*, 19 Dec. 721 (8 N. S. 109), it is held by Judge Corn of the court of common pleas of Adams county, that the courts of Ohio have jurisdiction of crimes and offenses committed on the Ohio river opposite its shores, and this is so although the statute defining the offense makes it unlawful to do the act within the limits of any county where prohibited. That case holds squarely that under the Rose law a party selling liquor in a boat on the Ohio river outside of ordinary low water mark on the Ohio side may be punished for violation of the Rose law. In that case the grand jury returned an indictment charging a violation of the Rose law, and the state and the defendant waived a jury and submitted the matter to the court upon an agreed statement of facts, which, for the purposes of the question involved, are practically identical with the case at bar, except as I have

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indicated, that in the case at bar the affidavit is filed under the Beal law instead of the Rose law.

As I have said before, there is no doubt that Ohio has a right to punish the commission of crimes and offenses committed against the laws of the state, though the occurrence takes place on the Ohio river outside of the territorial limits of the state. The difficulty in determining questions under the Rose law and under the Beal law, however, arises from the fact that the sale of liquor is not a crime except when committed in such portions of the state as have voted against it under the provisions of one of these two laws, or under what is known as the Township Local Option Law. If this was a question of the sale of liquor upon Sunday, the sale of liquor to habitual drunkards, or the sale of liquor to minors, there is no question in my mind but that the offense could be punished, and the court, in administering the law, would consider the offense as having been committed in the county bounding upon the river nearest to the place where the crime was committed. But where the peace and dignity of the state of Ohio is not infringed upon, unless the traffic in liquors is committed within certain prescribed limits, it may seriously be doubted whether, by any fiction of law, we can extend the limits of a county or a municipality for the purpose of branding as criminal an act which would be entirely innocent and lawful if committed in what is generally known as wet territory of the state. However, if the case at bar arose under the provisions of the Rose bill, I should be inclined to lay aside my doubts and accept the precedent set by Judge Corn until the higher courts of the state have passed upon the question, in order that no one might be encouraged to continue a traffic which is clearly so contrary to the interests and will of the inhabitants of territory which has voted against the sale of intoxicating liquors.

But can we go farther than this and hold that the same principle can be applied to the Beal law. Under that law, as I have indicated, the traffic in intoxicating liquors, to be illegal, must be carried on within the limits of such municipal corporation; and I have not been able to persuade myself, much as I would like to do so, that we can, by any fiction of law, say that a sale of liquor made outside the limits of such corporation is an offense against the laws of the state. It may be said that there is very little difference in principle between the Rose law, which forbids the traffic in intoxicating liquors within the limits of any county which has voted it out, and that which forbids such traffic in the limits of any city where it has been voted out. There is this difference, however. The county is that unit of the state which has been selected by the state through which to exercise its machinery for the punishment of crime, and as the jurisdictional limits of the state

extend across the river, we might, by a fiction of law, say that the jurisdictional limits of the county likewise extended across the river. But I can see no reason why the jurisdictional limits of a municipality should, for any purpose, extend beyond its territorial limits, unless such additional jurisdictional limits have been prescribed by statute.

Having this view of the case, it is the judgment of this court that the judgment of conviction in the mayor's court must be reversed, and the plaintiff in error restored to all things he has lost by reason of such conviction.

Before concluding this opinion, however, I feel like suggesting that in my judgment the legislature would have a clear right to pass an act providing, in express terms, that whenever, under any local option law, any municipal corporation, township or county, had made the traffic in intoxicating liquors unlawful, that it would likewise be unlawful for such traffic to be carried on in, or upon, such portions of the water of any navigable stream forming the boundary line between the state of Ohio and any other state as was opposite to, or bounded upon the territory in which the sale of liquor had, under the terms of any such local option law, become unlawful. If such an act were passed, it would, in my judgment, resolve any doubt which now exists as to the right of the state to punish in cases like the one at bar, or in cases for the violation of the township or county local option laws.

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Ejectment lies to recover possession of lands notwithstanding easement for certain purposes. *Cleveland v. Railway.* 372

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